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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 293

ARMOUR AND COMPANY, PETITIONER,

vs.

THE ALTON RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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3 State of Illinois, } ss.
County of Cook. }

IN THE CIRCUIT COURT OF COOK COUNTY.

Armour and Company, a corporation, *Plaintiff,*
vs.
The Alton Railroad Company, a corporation, *et al.*, *Defendants.*
} In Chancery. No. .....

COMPLAINT.

Plaintiff, Armour and Company, an Illinois corporation (operating in its own name, and also under the trade name of Morris and Company), with principal office and place of business in the City of Chicago, County of Cook, and State of Illinois, by Chas. J. Faulkner, Jr., Paul E. Blanchard and Walter C. Kirk, its attorneys, complains of
The Alton Railroad Company,
The Atchison, Topeka and Santa Fe Railway Company,
The Baltimore and Ohio Railroad Company,
The Chesapeake and Ohio Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company,
Charles P. Megan, Trustee of Chicago and North Western Railway Company,
Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company,
H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company,
Chicago Junction Railway,
The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway,
Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company,
The New York Central Railroad Company, as Lessee of

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Chicago and Erie Railroad Company,
Grand Trunk Western Railroad Company,
Illinois Central Railroad Company,
The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company,
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The Pennsylvania Railroad Company,
Pere Marquette Railway Company,
Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company,
and for grounds of said complaint respectfully shows:

1. That Plaintiff is, and for many years has been, engaged in the purchase and slaughter of ordinary livestock, and the processing and sale of meats derived therefrom, operating a packing plant for such purpose in the City of Chicago, Illinois, adjacent to the properties of The Union Stock Yard and Transit Company of Chicago (hereinafter for brevity called the Stock Yards Company), in the area commonly known as the Stock Yards District.

2. That each of the corporate defendants named herein now is and at all times named herein has been a railroad corporation. That on the 15th day of September, 1933 the defendant, Charles M. Thomson, was duly appointed, and qualified, as Trustee of the assets and properties of the Chicago and Eastern Illinois Railway Company. That on and after the 21st day of October, 1935 the defendant, Charles P. Megan, was duly appointed, and qualified, as Trustee of the Chicago and North Western Railway Company. That on the first day of December, 1935 the defendants, Patrick H. Joyce and Luther M. Walter, were duly appointed, and qualified, as Trustees of the property and assets of the Chicago Great Western Railroad Company. That on the 18th day of April, 1936, defendants H. R. Kurrie and Holman D. Pettibone were duly appointed, and qualified, as Trustees of the property of the Chicago, Indianapolis and Louisville Railway Company. That on the first day of January, 1936 the defendants, Henry A. Scandrett, Walter J. Cummings and George I. Haight, were duly appointed, and qualified, as Trustees of the property and assets of the Chicago, Milwaukee, St.

Paul and Pacific Railroad Company. That on the first day of December, 1933 the defendants, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, were duly appointed, and qualified, as Trustees of the property and assets of the Chicago, Rock Island and Pacific Railway Company. That prior to May 25, 1933 and at all times since said date, the defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr. (or their predecessors in office), were the duly appointed and qualified receivers of the properties and assets of the Wabash Railway Company.

That the said defendant railroad corporations and the said receivers at all times since May 25, 1933; and the defendant trustees at all times since the respective dates of their appointments and qualification as aforesaid, were, have been and now are engaged in the operation of a line or lines of railroad and in the transportation of property, including ordinary live stock, by rail, as common carriers for hire, from various points in the United States (including points in Illinois) to, and in the delivery of said property to consignees at, Union Stock Yards, Illinois, either alone or under joint arrangements with other common carriers by rail (on whose lines such live stock originated) under written contracts for such transportation. That each of said defendants was during the period of such operations, doing business in the County of Cook and State of Illinois.

5 That prior to the appointment of said Trustee defendants, and at all times on and after May 25, 1933, the railroad properties now operated by said trustee defendants were respectively operated by the corporations of whose properties the said Trustee defendants were made trustees aforesaid, but that plaintiff is unable to maintain this suit against said corporate defendants by reason of the prohibition of the respective federal courts appointing said Trustee defendants against the maintenance of any suit against said defendants for causes of action existing prior to the date of the appointment of said respective trustees. But plaintiff has filed, or will soon file, its claim alleging the same facts as are contained in this bill, against such corporate carriers, with the respective trustees, for damages suffered during such period by the respective breaches of contract of said corporate carriers made after May 25, 1933 up to the date of the appointment of said respective defendant Trustees.

3. As to all livestock originating at or shipped to Union Stock Yards, Illinois, via the lines of any and all

of the Defendants, each of said defendants (or, in the case of trustee or receiver defendants, their corporate predecessors) has used for many years, and still uses, a common depot or station at such point for the receiving, loading, unloading and delivering of ordinary livestock, which depot or station is located near the junction of 39th Street and Racine Avenue, in Chicago, Illinois, and which includes loading and unloading platforms, chutes, chute pens, alleys, and storage pens, and other facilities necessary to the shipment, receipt for shipment, or delivery of livestock transported by rail, all of which facilities are, and for many years have been, located adjacent to the rails used by each of Defendants' trains in reaching said Union Stock Yards, and from which facilities outbound livestock shipments are loaded, into which facilities inbound shipments of livestock are unloaded, and from which facilities delivery of such livestock, consigned to said station, is tendered to consignees, after such unloading.

4. The unloading platforms, chutes, chute pens, alleys, and storage pens referred to in the preceding paragraph as Defendants' common railroad depot or station, for many years have been, and now are owned and operated by, and located on the property of, the said Stock Yards Company.

For many years, the facilities of the Stock Yards Company, above described, have been designated and used by each of the Defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois, for the delivery of livestock consigned to commission merchants, packers, and others buying, selling, or receiving livestock at, to or from Union Stock Yards, and the Defendants in connection with their transportation of livestock, have, for many years, continuously kept on file with the Interstate Commerce Commission, and with the Illinois Commerce Commission, their tariffs stating the rates charged from each point of origin on their respective lines (and on lines of connecting rail carriers), to their said station or depot at Union Stock Yards, Illinois, above described.

5. That each of said Defendants has for many years held itself out, and now holds itself out, to transport, as a common carrier, livestock originating at any point on its lines (or received from connecting lines), from such origin point or points to Union Stock Yards, Illi-

nois, at which Defendants maintain their common livestock depot and station, there to be delivered to e consignee named in the contract for the transportaon thereof; and that each of said Defendants does regurly transport, and during the period here involved has ntinuously and regularly transported such livestock at tes named in tariffs lawfully on file with the Interstate ommerce Commission or with the Illinois Commerce ommission, from such origins to Union Stock Yards, Illiis, and has for many years held itself out as being ady, able, and willing to deliver livestock to consignees ter shipment, or accept livestock for shipment, at and om a station or depot located at Union Stock Yards, inois.

6. The Union Stock Yards is, and since, to wit, Dember 30, 1921, has been, a public stockyard posted as ch by the Secretary of Agriculture pursuant to the prosions of Section 302 of the "Packers and Stockyards t, 1921," U. S. C. A. Title 7, Chapter 9, Section 202. long established custom and usage as to intrastate affic, and by express statute (Sec. 15 (5), Interstate ommerce Act) as to interstate traffic, railroads transrting livestock destined to or received at public stockrds are required to unload and deliver the same to the ipper, owner, or consignee, in suitable pens, without tra charge therefor. Pursuant to such requirement, the efendants, and each of them, have for many years had rangements with the Stock Yards Company, whereby id company would act and has acted and still acts as eir agent in receiving in cars, unloading from cars, and lding livestock, in its pens at Union Stock Yards, until livery thereof could be tendered to, or taken by the nsignees to whom such livestock was consigned at Union ock Yards.

7. That at no time herein involved have the Defendts, or any one of them, owned or operated, or do any of em now own or operate any pens, chutes, or other facilies necessary for the unloading, holding until tender of livery, and the delivery of livestock, or the receipt of estock for shipment, at Union Stock Yards, Illinois, but ting in concert, by some lease, agreement, or other arngement unknown to Plaintiff, have used and still use e platforms, pens, chutes, and other facilities of the ock Yards Company for such unloading and delivery, d receipt and loading of livestock at said Union Stock rds station. And each of said Defendants has hereto-

fore published, and now publishes in current tariffs, the consideration paid by it, to said Stock Yards Company for loading or unloading such livestock into or out of cars at said station.

8. For many years each of said Defendants, having undertaken to transport, unload, and deliver livestock in carloads, to consignees at said common depot or station, Union Stock Yards, Illinois, have transported same with their own respective engines and crews, to a railroad track immediately adjacent to the unloading platforms of the said Stock Yards Company, and have there each delivered possession of each shipment of said livestock, on track, in cars, to said Stock Yards Company, and engaged the said Stock Yards Company as agent, to unload such livestock from cars, and to otherwise complete each transportation contract of the respective Defendants, with regard to such livestock consigned to Union Stock Yards. That no
7 one of the Defendants, publishes, or has published or filed with the Interstate Commerce Commission, or with the Illinois Commerce Commission, at any time herein involved, any tariff or schedule naming any charge to be assessed against the shipment or against the owner or consignee thereof, for such unloading or delivery, or any charge whatever applicable to such shipments of livestock, save and except the published and filed transportation rates applicable to said shipments.

On the contrary, the said agent, the Stock Yards Company, publishes and files its tariffs with the Interstate Commerce Commission naming specific charges per car assessed by it for loading or unloading carload shipments, and each of said Defendants has also filed its tariffs with each of said Commissions, providing for the payment of said charges of said Stock Yards Company by each of said Defendants, on all shipments of livestock transported to said Union Stock Yards by it; all of said tariffs being currently in effect. And each of said defendants does in fact make such payment to the Stock Yards Company as to each shipment of livestock unloaded and delivered by said Stockyards Company as aforesaid.

9. That in the transaction of its business, Plaintiff has for many years frequently purchased, and still purchases, livestock at points of livestock production in various states of the United States, or at other public markets, and shipped the same, or caused the same to be shipped, from such points of orig n on line or lines of railroad operated by one or more of said Defendants (or on connecting

lines) consigned to itself (or to Morris & Company, a trade name under which the Plaintiff conducts a part of its business) at Union Stock Yards, Illinois, for delivery to it at said station.

10. That during the period May 25, 1933 to date, Plaintiff, on thousands of occasions, contracted in writing with each of said Defendants for the transportation of carload shipments of ordinary livestock from various and numerous points of origin in the United States, on the respective lines of said Defendants, or of their connections, and for delivery of such shipments to the Plaintiff, as consignee, at Union Stock Yards, Illinois.

11. That each such contract covering each such shipment transported to Union Stock Yards by each Defendant, was identical in terms and conditions, saving and excepting only the kind of animals, number of head, origin point, and other details identifying each such shipment. That under the provisions of such contract, Defendants, or one or more of them, in each case contracted and agreed to transport said livestock from the origin named in each such contract (or from its junction with connecting lines) to Union Stock Yards, Illinois, and there to deliver the same to the consignee named in each of such written contracts, a copy of the portions of said contract which are and were uniform, is hereto attached, marked "Exhibit A," and incorporated into this pleading as though fully set out in the body hereof.

12. That Plaintiff loaded each of such shipments on cars at the respective points of origin and delivered each of such shipments to the contracting originating carrier in cars, in good order and condition, and in all other respects fully performed all duties imposed upon it under each of such contracts. That Plaintiff paid to De-
8 fendants, and to each of them, all charges claimed by them for each transportation service rendered, upon any and all of said shipments, in accordance with the tariffs of said respective Defendants applicable to said shipments, as published and filed with the Interstate Commerce Commission, or with the Illinois Commerce Commission.

13. That by reason of the employment by the Defendants of the Stock Yards Company, as the common agent for each of the Defendants, and of the unloading thereof by the said Stock Yards Company in such capacity as aforesaid, all of Plaintiff's said livestock, shipped under and by virtue of each of said contracts, was, by each of

the Defendants, placed in the possession and control of the said Stock Yards Company, as each Defendant's agent, while each shipment of such livestock was still in cars on tracks adjacent to the said unloading pens and facilities of the said Stock Yards Company, and each shipment was unloaded from said cars by said Stock Yards Company over unloading platforms and through unloading chutes or pens, or into other pens owned and operated by said Stock Yards Company, all before any tender of delivery of any of such shipments was made to consignee, the Plaintiff, by said Defendants, or by their agent, the said Stock Yards Company, and before the transportation of any shipment of said livestock had been completed, or the written contract therefor had been fully performed by any such Defendant.

14. That after said Stock Yards Company had unloaded each shipment of said livestock, the said Stock Yards Company notified the Plaintiff in each case, as to each shipment, the number and location of the chutes or pens into which said livestock had been unloaded or removed, and where each such shipment could be found at the time such notification was given. That the Plaintiff had at no time prior to receipt of such notice, as to any of such shipments, exercised any dominion or control, or given any direction either to the Defendant transporting any such shipment, or to Defendants' agent, the said Stock Yards Company, as to the time or manner of unloading, the platform at which, or the chutes or pens through or into which the said livestock was to be unloaded, or held pending tender of delivery or in any way directed or controlled, or attempted to direct or control either the Defendants, or any of them, or the said Stock Yards Company, in respect to unloading, yarding, driving, or handling of any shipment of said livestock, nor had any tender of any of said shipments been theretofore made to Plaintiff, either by the Defendant who transported the same to Union Stock Yards, or by the Stock Yards Company.

15. That Plaintiff, for many years prior to May 25, 1933, had made similar shipments of livestock to itself at Union Stock Yards, Illinois as to which the said Union Stock Yards Company was authorized to accept or hold for Plaintiff, or store or drive to Plaintiff's packing plant as Plaintiff's agent, after the transportation thereof had been completed, and after the contract therefor had been completely performed by Defendants. Frequently, prior

to said date, the Plaintiff ordered such shipments, after delivery thereof by Defendants to Plaintiff, to be weighed or stored or driven by said Stock Yards Company, or demanded said Stock Yards Company to do and perform other services in no wise incident or necessary to the
9 transportation or delivery of said livestock, for all of which Plaintiff paid to said Stock Yards Company, over and above any transportation charges applicable thereto, its published charges named in its tariffs on file with the Secretary of Agriculture since December 30, 1921 for the additional services so performed at Plaintiff's special instance and request.

16. On May 9, 1933, Plaintiff notified each of the Defendants herein, and their agent, the Stock Yards Company, in writing, that on and after May 25, 1933, it would accept delivery of all shipments of livestock consigned to it, either at the unloading chutes or at such other point at which delivery of such livestock was tendered by Defendants or by their said agent; and would remove said livestock from the said point of delivery within a reasonable time after such delivery; and that on and after said date it would pay to Defendants, or their said agent, no charges on livestock so accepted and removed, save and except the charges lawfully applicable for the transportation thereof under said written contracts and tariffs, which said notices are heretofore attached, marked Exhibits "B" and "C" and incorporated into this pleading as though fully set out in the body thereof.

17. On May 10, 1933, the said agent, the Stock Yards Company, notified the Plaintiff in writing that it had received said notice, but that it would demand the payment of certain charges alleged to be due it, on all livestock consigned to Plaintiff at said station, Union Stock Yards, Illinois, and placed in possession of said Stock Yards Company by any or all of said Defendants, and that no one of the said Defendants owned or maintained any pens or other facilities at said station through which livestock unloaded by said Stock Yards Company could be delivered to Plaintiff without the payment of a charge over and above the rates and charges named in Defendants' tariffs for transportation; and that on and after May 25, 1933, the said agent would refuse to deliver any livestock of Plaintiff coming into its possession as carriers' agent, for unloading, to the Plaintiff unless and until the Plaintiff paid or promised to pay to said agent, the charges demanded by said agent, over and above all charges for

transportation in accordance with said written contracts, published by the several Defendants in their respective tariffs and schedules currently on file and in effect, which said notice is hereto attached, marked Exhibit D, and incorporated into this pleading as though fully set out in the body thereof.

18. Thereafter, on May 16, 1933, Plaintiff notified each of said Defendants of the aforesaid statements and demands of their said unloading and delivering agent, the Stock Yards Company, as stated in the said notice of May 10, 1933, by delivering a copy thereof to each of said Defendants, and notified each of said Defendants, and their agent, the Stock Yards Company, that on and after May 25, 1933 the said Stock Yards Company would have no authority, after unloading such livestock, to accept or receipt therefor in Plaintiff's name, or for its account; that any delivery of Plaintiff's livestock by any Defendant to the said Stock Yards Company (other than delivery as Defendants' unloading and delivering agent), would constitute a conversion of Plaintiff's property; and that any payment made by Plaintiff in order to gain possession of its property from said Stock Yards Company would be made under protest, for account of the Defendant who had placed the livestock in the possession of the Stock Yards Company, and in mitigation of damages, which said notice is hereto attached, marked Exhibit E, and incorporated into this pleading as though fully set out in the body thereof. And, at the same time, Plaintiff notified the said unloading agent of said carriers, viz., the Stock Yards Company, of its notification given each of said Defendants as aforesaid, and further notified said Stock Yards Company that on and after May 25, 1933, it would accept delivery of such livestock at the unloading chutes, or at any other point where tender thereof was made, and promptly remove from the premises of said agent, such livestock belonging to Plaintiff, transported to Union Stock Yards by each and every Defendant, and delivered to said agent for unloading; and that on and after said date, Plaintiff did not desire and would not accept, receive or pay for any service rendered to, or facilities used by said livestock, beyond the point at which it was ready and willing to accept such livestock, when and where tendered, and from which it was ready and willing to promptly remove such livestock from such point of delivery; and that on and after said date, the said agent, the Stock Yards Company, had no authority to accept, handle,

or receipt for such livestock as agent of the Plaintiff, which said notice is hereto attached, marked Exhibit F, and incorporated into this pleading as though fully set out in the body thereof.

19. That during all times and dates herein mentioned, each Defendant well knew that it owned or operated for its own account, no facilities into which shipments of livestock consigned to Plaintiff at said common station, Union Stock Yards, Illinois, could be unloaded, and from which such shipments of livestock could be tendered or delivered to Plaintiff; and each Defendant well knew that it could not fully perform any of said written contracts for the transportation of such shipments to Union Stock Yards, Illinois, and for delivery thereof to the Plaintiff at such station, for the consideration named in such contracts, save by use of the pens, platforms, chutes, and other facilities of its said agent at said station; and that on and after May 25, 1933, each Defendant well knew, before it delivered possession of said livestock to said Stock Yards Company for unloading from cars, that said Stock Yard Company would unload, hold and tender delivery of the same at a point which was accessible to Plaintiff only by crossing other property of the said Stock Yards Company and from which, after tender and acceptance of possession, no egress could be had by said Plaintiff with its said livestock, save by crossing other property of its said agent, the Stock Yards Company; and each Defendant well knew that its said agent, having received possession of said livestock before unloading, or tender of delivery, would make no tender of delivery to Plaintiff at any point save and except at a point accessible to Plaintiff only by crossing the property of the said agent, the Stock Yards Company; and each Defendant well knew that its said agent, to whom it had delivered each of said shipments for unloading would refuse to complete said transportation contract, or to tender delivery, or to deliver, or surrender possession of said livestock to the Plaintiff unless and until the said Plaintiff had paid, or promised to pay, a toll or charge for crossing the said premises of the said agent, the Stock Yards Company, and for driving its animals across
11 said premises after delivery; and each of said Defendants well knew that the payment of the sum so demanded by its said agent as a condition precedent to the surrender of the possession of said livestock to the Plaintiff was not a charge filed or published by any Defendant, or by the agent of any Defendant, with the Inter-

state Commerce Commission or the Illinois Commerce Commission for any service incident to or connected with the performance of any of said written transportation contracts; notwithstanding which the defendants, on May 25, 1933, refused and have since said date continuously refused to provide or establish by lease or otherwise at their said common station, Union Stock Yards, Illinois, any depot or platforms, pens, or facilities over and through which Plaintiff might accept delivery of, and from which Plaintiff might remove its said shipments, transported under said written contracts, without payment of any toll or charge other than the charges lawfully applicable to such transportation under such written contracts; and the Defendants wholly failed to make any arrangement with its said agent under and by virtue of which the Plaintiff might have free ingress to the point at which delivery of livestock was so tendered, and egress from the point of delivery thereof, to a public street or other point, off the premises of said Stock Yards Company, without being compelled to pay a toll or charge over and above the charges lawfully applicable to said transportation, and a charge not filed with the Interstate Commerce Commission or the Illinois Commerce Commission, and not lawfully applicable in connection with the transportation service specified in said written contracts.

20. That, since May 25, 1933, upon arrival of each and every shipment of livestock, made on each of said written contracts with each of said Defendants, consigned to Plaintiff at Union Stock Yards, Illinois, and delivered by each of said Defendants to the Stock Yards Company as aforesaid, Plaintiff has demanded delivery of the same from said Stock Yards Company as soon as said livestock has been unloaded, immediately after unloading. That delivery of each of said shipments was refused by said Stock Yards Company unless and until Plaintiff paid, or promised to pay to Defendants' unloading agent, the Stock Yards Company, the sums demanded by said agent as a condition precedent to the delivery thereof, all of which each of Defendants well knew and still knows.

21. That the sums so paid by Plaintiff under protest were demanded by and paid to said agent, the Stock Yards Company, in terms of cents per head of livestock delivered, and since May 25, 1933 have been so demanded and paid in differing amounts as to different species of livestock, to wit, cattle, calves, sheep and hogs, and in amounts changing and varying since May 25, 1933, as to

each species of livestock. That Plaintiff has been injured and damaged in a large sum of money by the concerted and repeated action of said Defendants, and of each of them, by reason of their repeated failure and refusal to deliver livestock transported by them for Plaintiff, under said written contracts, to Plaintiff at a point at the destination named therein at which Plaintiff could accept delivery of said livestock, and from which Plaintiff could promptly remove said livestock, all without the payment by the Plaintiff of any charge or demand save the rates and charges applicable to said shipments as published
12 and filed with the Interstate Commerce Commission or the Illinois Commerce Commission.

22. That in mitigation of damages, Plaintiff has paid to said unloading agent, the Stock Yards Company, under protest, the sums demanded by it per head of livestock as a condition precedent to the delivery to Plaintiff of each shipment of livestock, transported by each Defendant to Union Stock Yards, Illinois, consigned to Plaintiff, since May 25, 1933; and in each case, has demanded repayment of such sums from each of the respective Defendants which transported each of such shipments to Union Stock Yards, which demand each Defendant refused and has since continuously refused.

23. That the Defendants herein named at all times named herein constituted and still constitute all of the carriers by rail having lines traversing the livestock production areas within which Plaintiff purchases and from which Plaintiff ships or causes to be shipped, livestock to its order at Union Stock Yards, Illinois, so that Plaintiff in the conduct of its said business was and is compelled to use the transportation facilities of said Defendants for such shipments; that there has been and still is concert of action among all of said Defendants in that they all have adopted and used, and still use, the same form of livestock contract; have all joined and still join, in a single tariff in naming said rates to Union Stock Yards, Illinois; have all appointed the same common agent for the unloading of their cars at the Union Stock Yards in Chicago, namely, the Stock Yards Company; have all established and used a common depot or station at said point; and all use the same unloading chutes and pens as their station or depot for the delivery of livestock; and have all appointed the same agent empowered to collect, receive and receipt for all freight charges on all of said shipments; and all wrote Plaintiff verbatim letters in re-

sponse to Plaintiff's several protests regarding the lien or charge imposed on Plaintiff's livestock by Defendants' common agent, the Stock Yards Company.

24. That at no time herein involved has Plaintiff demanded from any Defendant, or from their agent, the Stock Yards Company, the right to use any specific pens, alleys, runways, overhead drives, or tunnels of Defendants' agent, the Stock Yards Company, in accepting delivery of or removing livestock from the point at which delivery thereof was tendered, to the packing plants of Plaintiff; but have sought only to be permitted to take possession of its shipments of livestock at the unloading pens used by the Defendants as their depot or station in the Union Stock Yards, Chicago, Illinois, or at whatever point therein tender of said livestock was made, and thence to remove said shipments of livestock to a public street, or to such other point, off the premises of said Stock Yards Company, as that company, or the Defendants, might designate, by whatever route or means of egress, as might from time to time be determined by the Defendants, or by their joint agent, the Stock Yards Company.

25. That the Plaintiff has not, since May 25, 1933, in connection with any one of its shipments covered by this complaint, demanded or required the use of any facility of said Stock Yards Company, or any service from said Stock Yards Company, save such as was incidental to the unloading, storage pending tender of delivery, tender
13 of delivery, and delivery to Plaintiff, ingress for Plaintiff to the point where delivery of such livestock was tendered, and egress as aforesaid for such livestock from such point of delivery, all of which Defendants are required by their contract of transportation and by law to provide for Plaintiff, as to each of such shipments.

26. Since May 25, 1933, Plaintiff has continuously insisted and demanded, and still demands of the Defendants, that they deliver its livestock to it at the depot or station designated in their respective tariffs, viz., Union Stock Yards, Illinois, without the imposition of any lien or charge (save and except the respective tariff rates for transportation) against said livestock by any Defendant or its agent, the Stock Yards Company, in all cases where Plaintiff was willing and able to promptly remove such livestock from the unloading pens, or from the point where delivery was first tendered, within a reasonable time after the unloading of same from the cars, but each Defendant has continuously refused and still refuses to

effect any such delivery of such livestock to Plaintiff at such station.

27. Notwithstanding the written notices and protest to the Defendants above referred to, and the further demands made upon the Defendants from time to time for the payment of the expense to which Plaintiff has unlawfully been put, as aforesaid, Plaintiff is informed and believes and therefore alleges that the Defendants have made no protest to said agent, nor have any of them made or attempted to make any different arrangements for the unloading or tender, or delivery of Plaintiff's livestock at the Union Stock Yards depot or station of the Defendants, but, each Defendant has seemingly, acquiesced in and ratified the acts of said common agent, in the respects aforesaid.

28. That because of the course of conduct hereinbefore set forth, the Defendants have severally breached the duty severally imposed upon them by law as common carriers of livestock for hire, to provide reasonably convenient accessible and safe unloading pens, at the said common depot or station, at which such livestock could be tendered to Plaintiff, and from which Plaintiff's livestock could be taken by Plaintiff within a reasonable time after unloading, or tender of delivery, without the imposition of any charges other than the transportation charges lawfully applicable under said written contracts, and without the imposition of other and additional charges which were never at any time contained in any tariff filed by said Defendants, or any of them with the Interstate or Illinois Commerce Commissions, or applicable to said shipment under the terms of any contract to which Plaintiff was a party. Also, by reason of such facts, Defendants have breached each of their several transportation contracts with the Plaintiff, in failing to afford to Plaintiff an opportunity of receiving its livestock and of removing the same with reasonable promptness from the unloading pens used by Defendants at Union Stock Yards, Chicago, Illinois, or from any point at which delivery thereof is tendered, which opportunity has in all cases been denied the Plaintiff unless and until it paid the said charges of Defendants' common agent, the Stock Yards Company, which
14 charges were neither published nor applicable as a transportation charge, or which Plaintiff had contracted to pay.

29. Plaintiff alleges that it is continuing to ship or cause to be shipped livestock to itself as consignee at said

Defendants' station, Union Stock Yards, Illinois, and will continue to ship such livestock for many years, that Defendants' refusal to effect delivery of such livestock is continuous and repeated and will be continued in the future, that each shipment of livestock, via the line of each Defendant, is made upon a separate written contract, and each breach thereof as to each such contract is a separate breach, giving rise to a separate cause of action at law, that Plaintiff is regularly entering into approximately one hundred and fifty of such contracts each and every week, and Defendants are each regularly, uniformly and habitually breaching each such contract as hereinbefore stated, and are each failing and refusing to effect a free delivery of the animals named in such contract. That the damage accruing to Plaintiff on each carload shipped, as hereinbefore alleged, ranges from $13.50 to $20.00 per car; that many of said contracts cover the movement of but a single car; and that unless each of Defendants be enjoined as hereinafter prayed Plaintiff will be compelled to bring suits containing in the aggregate more than one hundred and fifty counts each week against each of the said Defendants, many thereof for amounts approximating only $15.00 each; and that unless equitable relief be granted Plaintiff will be compelled to bring and maintain a great multiplicity of suits against each of the same individual defendants, all for the same breach of contracts indentical in their terms.

30. Plaintiff further alleges that six of the twenty-four lines of railroad here involved are now operated, and for some portion of the period since May 25, 1933 have been operated by defendant trustees; that Plaintiff has no knowledge of the manner in which responsibility was divided between the corporations and the said respective trustees as to shipments arriving at Union Stock Yards, Illinois, on or about the day said trustees assumed responsibility for the operation of the lines of railroad transporting its livestock to Union Stock Yards, Illinois, as aforesaid, so that, as to such shipments Plaintiff is unable to ascertain whether the corporate defendant, or the said trustee defendants, are responsible for the breach of contract made as to such shipments.

31. Plaintiff further alleges that since May 25, 1933, it has shipped or caused to be shipped to its own order at Union Stock Yards, Illinois, via the lines of Defendants in the aggregate more than ten million head of livestock, contained in approximately ninety thousand cars moving

upon approximately fifty thousand separate and distinct contracts identical in terms to the contract attached hereto as Exhibit A; that each of the defendants operating each of the twenty-four lines of railroad here involved, defendants, has committed the same breach of each of such contracts identical in terms executed by it or them, by delivery of each of said shipments to the same agent, at the same point, each well knowing in each instance that said agent would refuse to deliver said livestock to Plaintiff save upon payment of certain charges, not required to be made by Plaintiff under any provision of any of said contracts, or by any tariff on file with the Interstate or
15 Illinois Commerce Commission. That recovery of damages at law would require the bringing and maintenance of approximately fifty thousand separate causes of action, the issues of each of which would be identical, against twenty-four separate defendants.

32. That the charges paid by Plaintiff, in mitigation of damages as aforesaid, which Plaintiff here seeks to recover, were charges per head, applicable upon each of the said ten million head, in amounts which varied, as to different species during all the time elapsed since May 25, 1933, and which have changed from time to time, as to each species, during said period. That the mere computation of the amount paid by Plaintiff to gain possession of the livestock moving upon the many thousand of transportation contracts entered into with said twenty-four defendants, and the division of such amounts between corporate and trustee Defendants is so complex and intricate as to require that the court appoint a special master to make an accounting and computation of the moneys which the Plaintiff has paid to said Defendants' agent, the Stock Yards Company, under protest, in mitigation of damages, solely in order to gain possession of its said livestock at said Union Stock Yards, following transportation by said Defendants, and by each of them, and to determine the amount each of said Defendants should pay to Plaintiff as total damages resulting from the thousands of breaches of thousands of identical written contracts on account thereof.

33. Plaintiff says that its said claim is peculiarly one for equitable jurisdiction in that each of the thousands of bills of lading or livestock contracts made and entered into since May 25, 1933 between Plaintiff, and each and

all of the Defendants is identical in its terms, differing only in details as to number of head of livestock shipped, weight, rate, point of origin and like particulars. In each and every such written contract, the Defendant executing the same covenanted and agreed to transport livestock to the identical destination, viz., Union Stock Yards, Illinois, so that the rights, liabilities, powers, privileges and immunities created by each such contract are identical as to each shipment handled by each Defendant. That in the case of each contract with each Defendant, the livestock was delivered to the same agent at the same point for unloading; that regardless of which Defendant transported a shipment of livestock here involved. Plaintiff in all cases paid the freight charges thereon to the same person, as joint agent of all Defendants; and the claim asserted by Plaintiff against each Defendant under each of said fifty thousand identical contracts is identical, viz., a repeated failure to provide a place and facilities for free delivery to consignee of the livestock so transported. That each alleged breach of contract or duty imposed by law occurred at the same place and in the same manner. That Plaintiff's demand for delivery and possession in the first instance was made and directed to the same agent, and the refusal to deliver without the payment of charges over and above the transportation charges was made by the same agent, in the same language and under the same terms and conditions, and Plaintiff asserts as to each transaction with each Defendant the same rights, and alleges the same liability arising from the same conduct. No Defendant has denied liability to Plaintiff on any ground differing from the grounds asserted by every Defendant, and in response to the demands made, and
16 notices served upon the several Defendants in connection with the subject matter here involved, each Defendant responded or replied with the same letter couched in the same words. That the statutes of Illinois and of the United States applying to any one of said written contracts with any one of said Defendants, apply with equal force to every other contract with every other Defendant.

34. That the equitable remedy of mandatory injunction is necessary to require the Defendants to make delivery of Plaintiff's livestock to it at said common station, upon payment by Plaintiff of the published rates to that station.

Wherefore, Plaintiff prays:

1. For summons directed to the Defendants, and each of them, requiring them to appear and answer the charges herein;

2. That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it at Union Stock Yards, Illinois, at the unloading pens of the Defendants in the Union Stock Yards, Chicago, Illinois, or at such other point as same may be tendered, upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, or of any other person, firm or corporation;

3. That a mandatory injunction be entered requiring the Defendants, and each of them, under penalty of law, on and after a date to be fixed by this court, to provide suitable ingress for Plaintiff to the point at which delivery of such livestock is tendered, and proper and reasonable, egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to Plaintiff, at the Union Stock Yards in Chicago, Illinois, without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company, or any other person, firm, or corporation, save and except the said rates for transportation of said livestock, lawfully applicable thereto.

4. That the court appoint a Special Master to audit and tabulate, and make an accounting of the moneys which the Plaintiff has paid and, pendente lite, will pay to the Stock Yards Company under protest, and in mitigation of damages, in order to gain possession of its property and to remove the same from the point at which said property was delivered to it, and to compute the portion thereof due from each defendant herein.

5. That when the total amount paid by the Plaintiff to the Stock Yards Company, under such circumstances on and after May 25, 1933 and up to the date of said decree, or of any injunction issued herein and the portion thereof due Plaintiff from each Defendant, has been ascertained, that a judgment be entered by this court against each of said Defendants in such amount as is shown to have been incurred with respect to shipments made via the lines of such Defendant, together with interest.

17 6. And for such other and further orders as to the court may seem proper in the premises.

Armour and Company,
Plaintiff,

By (Signed) W. S. Clithero,
Vice President.

(Signed) Charles J. Faulkner, Jr.,
(Signed) Paul E. Blanchard,
(Signed) Walter C. Kirk,
Attorneys for Plaintiff.

Office Address:
Armour Building,
Union Stock Yards,
Chicago, Illinois.
Tel.: Yards 4745.

State of Illinois, } ss.
County of Cook. }

W. S. Clithero, being first duly sworn on oath deposes and says that he is an officer, to wit, Vice President of the plaintiff in the above entitled action; that he has read the foregoing complaint by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to those matters stated on information and belief and as to such matters he believes it to be true.

(Signed) W. S. Clithero.

Subscribed and sworn to before me this 19th day of May, A. D. 1938.

(Signed) J. A. Dorin,
Notary Public, Cook County, Illinois.

(Notarial Seal)
J. A. Dorin,
Notary Public.

My commission expires Mar. 11, 1939.

18 EXHIBIT A. Exhibit A.

(Blank form of contract used by all defendants herein in connection with each shipment of livestock involved herein.)

J-30M-4-37 F. C. 6-30 Form 176 Revised

(Uniform Live Stock Contract, adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922, as amended August 1, 1930.)

Uniform Live Stock Contract

This form of contract to be used for shipments of Live Stock and Wild Animals instead of Uniform Bill of Lading.

Duplicate Original.—Not Negotiable

(Name of Carrier) Railroad Company

..... Station, ..., 19.....

This Agreement, made this ..... day of ....., 19....., by and between the (Name of Carrier) ...., party of the first part, hereinafter called the carrier,* and ..... (Shipper's name) part..... of the second part, hereinafter called the shipper;

Whereas, The classifications and tariffs under which this agreement is made require that, for the purpose of applying the lawful rate of freight, the shipper must declare the shipment to be "Ordinary Live Stock," specifying the kind or kinds of animals, or if not "Ordinary Live Stock" he must declare the kind and value of each animal, space for such declaration being provided below:

Now, Therefore, This Agreement Witnesseth, That the carrier has received from the shipper, subject to the classifications and tariffs in effect on the date of issue of this agreement, the live stock described below, in apparent good order, except as noted, consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, if on its road or on its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier* of all or any of said live stock over all or any portion of said route to destination, and

as to each party at any time interested in all or any of said live stock, that every service to be performed and every liability incurred in connection with said shipment shall be subject to all the conditions, whether printed or written, herein contained, including the conditions on back hereof, and which are agreed to by the shipper and accepted for himself and his assigns.

Consigned to .....

Destination ....., State of ....., County of .....

Route .....

Car Initials and Numbers .....

.....

Ordinary Live Stock

Ordinary live stock means all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. On shipments of ordinary live stock no declaration of value shall be made by the shipper, nor shall any values be entered on this bill of lading.

I (We) declare the shipment covered by this bill of lading to be ordinary live stock.

.....

Shipper.

Other Than Ordinary Live Stock

On shipments of live stock chiefly valuable for breeding, racing, show purposes, or other special uses different rates of freight are in effect dependent on the valuation placed thereon by the shipper; which valuation may be the basic value as stated in the classification, at which the lowest freight rate applies, or it may be any higher valuation up to actual value, in which event the freight rate will be higher by the amount prescribed in the tariffs or classifications. Such declared or agreed values shall be entered in the column provided therefor in this bill of lading, and in no event shall the carrier be liable for any amount in excess of such valuation.

I (We) declare the shipment covered by this bill of lading to be other than ordinary live stock, and of the value herein declared, or agreed upon, and entered.

.....

Shipper.

Note.—The shipper shall execute one of the above declarations. Upon refusal of a shipper of other than ordinary live stock to declare the values of said stock for entry in this bill of lading the shipment will not be accepted for transportation under this contract. In the event the shipment consists of both ordinary live stock and other than ordinary live stock, both of such declarations shall be executed, but values shall be declared and entered on only the other than ordinary live stock.

Number and Description of Animals	Shipper's Declared Value (If on live stock chiefly valuable for breeding, racing, show purposes, or other special uses)	Weight (Subject to correction.)	Rate of Freight	
			Per 100 pounds.	Per car

Subject to Section 3 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

.....

Signature of Consignor.

If charges are to be prepaid, write or stamp here, "To be prepaid."

.....

Acknowledgment to be used if freight is prepaid.

Received $....., to apply in prepayment of the charges on the live stock described hereon.

.....

Agent or Cashier.

Per .....

(The signature here acknowledges only the amount prepaid.)

Charges advanced, $.....

Witness my hand: .....,
Shipper.

By .....,
Shipper's Agent.

.....

.....,
Witness.

.....
(Name of Carrier)

By .....,
Agent.

*The word "carrier" is to be understood throughout this contract as including any person or corporation in possession of the live stock under the contract.

Contract Terms and Conditions

Sec. 1. (a) Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the live stock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weath or damage to or obstruction of track or other causes beyond the carrier's control.

(c) In case of quarantine, the live stock may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case

carrier's responsibility shall cease when the property is so discharged, or the property may be returned by carriers at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to the property shall be borne by the owners of the property or be a lien thereon. In case a shipment is stopped in transit by quarantine, the carrier shall immediately give notice of such fact to the shipper or consignee. Except in the case of its negligence proximately contributing thereto, no carrier shall be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done under quarantine regulations or authorities, nor for detention, loss, or damage of any kind occasioned by quarantine laws or in the enforcement thereof; and the shipper shall hold the carrier harmless for any expense it may incur or damages it may be required to pay by reason thereof.

Sec. 2. (a) No carrier is bound to transport said live stock by any particular train or vessel or in time for any particular market, or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said live stock by any carrier or route between the point of shipment and the point of destination.

(b) In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the live stock as determined by the classification or tariffs upon which the rate is based, such lower value, plus freight charges, if paid, shall be the maximum amount to be recovered whether or not such loss or damage occurs from negligence.

(c) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accord-

ance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

Sec. 3. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this live stock contract until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of the contract that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consigned to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original contract, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this Live Stock Contract, the freight charges must be paid upon the articles actually shipped.

Sec. 4. (a) The shipper at his own risk and expense shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. In case any person shall accompany the live stock in charge of same, he shall take care of, feed and water the live stock while being transported, whether delayed in transit or otherwise, and whenever such person shall open or close any door or opening in the car or cars, or the pens or compartments in the vessel, he shall see that the same are so closed and fastened as to prevent the escape therefrom of any of the live stock.

(b) When bedding or appliances of a character not generally in use in the transportation of live stock are required, they shall be furnished by the shipper at his own expense and he shall separate different kinds of stock when loaded in the same car by adequately strong partitions and such stock shall be at the risk of the shipper as to any damage resulting from the insufficiency or inadequacy of any such bedding, appliance, or partition.

(c) Before the live stock is removed from the possession of the carrier or mingled with other live stock the shipper, owner, consignee or agent thereof shall inform in writing the delivering carrier of any visible or manifest injury to the live stock.

Sec. 5. (a) If all or any part of said live stock is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be

liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the live stock herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, and assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence, such carrier shall not be responsible for any loss or damage to live stock if it be necessary or is usual to carry the same upon deck.

(d) General average shall be payable according to York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby, according to the law and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the live stock is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this uniform live stock contract.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 6. Any alteration, addition, or erasure in this contract which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this agreement, shall be without effect, and this agreement shall be enforceable according to its original tenor.

Separate Contract with Man or Men in Charge of Live Stock.

.....Station,.....19....

In consideration of the carriage of the undersigned upon a freight train or vessel in charge of the live stock mentioned in the within contract, whether with or without charge for such carriage, each one of the undersigned severally hereby voluntarily assumes all risk of accident or damage to his person or property, and hereby releases and discharges each and every carrier from every claim, liability, or demand of any kind for or on account of any personal injury or damage of any kind sustained by him, unless caused by the negligence of such carrier or any of its employees; and agrees that whenever he shall leave the caboose and pass over or along the cars or track he will do so at his own risk of personal injury, except where the negligence of the carrier proximately contributes thereto, and that no carrier shall be required to stop or start its train or caboose cars at or from the depot or platforms, or to furnish light for his accommodation or safety.

.....

.....

.....

.....

(Signature of man or men in charge.)

.....

Witness.

Spaces provided below must be filled in by conductors. Attendant should present contract to conductors for this purpose.

From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....
From..... To..... Date..... Train..... Conductor.....

Agents must insert car and waybill references in spaces provided below.

Initial	Number	W/B No.	Date

Initial	Number	W/B No.	Date

Exhibit B. 19

EXHIBIT B.

(Letter of Armour and Company to each Defendant named in Exhibit C, post.)

May 9, 1933

Dear Sir:

Numerous direct shipments of live stock are consigned via your line of railroad to Armour and Company or its subsidiaries at the Union Stock Yards, Chicago, Illinois. By direct shipments are meant shipments in which Armour and Company, or its subsidiaries, are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to the completion of the transportation contract.

When such shipments are delivered to Armour and Company or its subsidiaries through the facilities of the Union Stock Yard & Transit Company of Chicago, Armour and Company, up to this time, has been required to

pay not only the transportation rate of your railroad to Union Stock Yards, Chicago, Illinois, but in addition thereto, the yardage charge assessed by the Union Stock Yard & Transit Company of Chicago; regardless of the fact that Armour and Company's employees may have performed the entire service rendered subsequent to the unloading of the live stock.

Armour and Company is advised that the carriers have no legal right to effect such a delivery of live stock as results in requiring Armour and Company to pay yardage charges to the Union Stock Yard & Transit Company of Chicago on such direct shipments as to which no yardage service is desired or received. Armour and Company is prepared to accept such shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards and, within a reasonable time, to remove the live stock therefrom to its own plants without other use of the facilities of the Union Stock Yard & Transit Company of Chicago.

In order that Armour and Company and its subsidiaries may not further be subjected to said yardage charges of the Union Stock Yard & Transit Company upon such direct shipments, which it is advised are unlawful, this is to notify you that, on and after May 25, 1933 Armour and Company will be prepared to accept at such reasonable and proper delivery pens of the carriers at Union Stock Yards, Chicago, all shipments of live stock consigned direct to Armour and Company or its subsidiaries at Union Stock Yards, Chicago, Illinois and to remove the same within a reasonable time thereafter, and that on and after said date Armour and Company will refuse to pay to the carriers, or to the Union Stock Yard & Transit Company of Chicago, any yardage charge upon such shipments of live stock so delivered by the carriers and so accepted and removed by Armour and Company and its subsidiaries and its or their employees at and from such reasonable and proper delivery pens of the carriers at Union Stock Yards, Chicago.

Yours truly,

(Signed) F. W. Ellis

Vice President.

Exhibit C. 20

EXHIBIT C.

(Letter of Armour and Company to Stock Yards Company.)

May 9, 1933

Mr. A. G. Leonard, President,
Union Stock Yard & Transit Co. of Chicago,
Union Stock Yards, Chicago, Illinois.

Gentlemen,

Herewith please find copy of letter we have sent to the respective officers of the following common carrier corporations:

The Alton Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago and Eastern Illinois Railway Company
Chicago and North Western Railway Company
Chicago, Great Western Railroad Company
Chicago, Indianapolis and Louisville Railway Company
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee)
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
The Chicago, Rock Island and Pacific Railway Company
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company
Chicago and Erie Railroad Company
Grand Trunk Western Railroad Company
Illinois Central Railroad Company
The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee)
Minneapolis, St. Paul & Sault Ste. Marie Railway Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Pere Marquette Railway Company
Wabash Railway Company (Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers)

Kindly accept this as official notice that on and after May 25th, 1933, we shall not pay yardage charges on direct shipments of live stock received or accepted by us in the manner outlined in said letter.

Yours truly,
(Signed) F. W. Ellis
Vice President.

21 EXHIBIT D. Exhibit D.

(Reply of Union Stockyards Co. to Armour and Company.)

May 10, 1933.

Mr. F. W. Ellis, Vice-President,
Armour and Company,
Union Stock Yards,
Chicago.

Dear Sir:

The Union Stock Yard and Transit Company of Chicago begs to acknowledge receipt of your favor of the ninth instant.

This Company also acknowledges receipt of what purports to be a copy of a letter sent by you to various railroad officials in Chicago and elsewhere, dated as of the same date.

On behalf of The Union Stock Yard and Transit Company of Chicago I beg to hereby formally advise you that the property of The Union Stock Yard and Transit Company of Chicago is its private property and that its tariffs are on file with properly constituted authorities.

So long as Armour and Company route or permit or cause to be routed their shipments of livestock to themselves at the yards of this Company, The Union Stock Yard and Transit Company of Chicago will insist on the payment of its yardage charges before such live stock is released.

We observe in your letter to the carriers that you say you are prepared to accept shipments at reasonable and proper delivery pens of the carriers at the Union Stock Yards.

You hereby are notified that the carriers to which your letter purports to be addressed do not own or control any facilities or property at the yards of this company which can be used either by consignees of live stock consigned to the yards of this Company or by the carriers,

for the delivery of live stock after unloading, without the payment of the yardage charges imposed by this company for the use thereof.

Until and unless your threat of not paying the tariff yardage charges of The Union Stock Yard and Transit Company of Chicago is withdrawn, or until and unless such charges are paid, this Company will not permit live stock consigned to you at its yards to be delivered to you or to your employees, on and after May 25, 1933.

Very truly yours,
The Union Stock Yard and Transit
Company of Chicago
(Signed) By Arthur G. Leonard
President.

Exhibit E. 22

EXHIBIT E.

(Letter of Armour and Company same railroads to whom letter of May 9th (supra) was transmitted.)

May 16, 1933

Dear Sir:

As a matter of information, we furnished the Union Stock Yards & Transit Company of Chicago, Illinois, a copy of our letter to you, dated May 9th, 1933, concerning shipments of live stock consigned to us at Union Stock Yards Station, Chicago, Illinois. Please take notice of the matters stated in its response to us, dated May 10th, 1933, copy of which is attached.

You are hereby notified that on and after May 25th, 1933, the Union Stock Yards & Transit Company of Chicago, Ill. has no authority, after unloading such live stock, as your agent, in accordance with its tariff, to thereafter accept, or receipt for such live stock for us, as our Agent, for our account, or in our name. On and after May 25, 1933, any delivery by your railroad of our live stock to the Union Stock Yard & Transit Company of Chicago, Illinois (other than delivery of such live stock to the Union Stock Yard & Transit Company of Chicago, Illinois as your agent for unloading and delivery to us) will constitute a conversion of our property. Any payment by us of yardage or other charges to the Union Stock Yard & Transit Company of Chicago, Illinois made to gain possession of such property on and

after said date will be under protest; will be for your account, and will be made purely in mitigation of damages.

For your information, the shipments referred to above, as well as those referred to in my letter of May 9th, 1933, are billed to Armour and Company as such, or operating under the trade name of Morris & Company.

Yours very trudy,

(Signed) F. W. Ellis,
Vice President.

23 EXHIBIT F. Exhibit F.

(Letter of Armour and Company to Union Stock Yards Company.)

May 16, 1933.

Mr. Arthur G. Leonard, President,
The Union Stock Yard and Transit
Company of Chicago,
Union Stock Yards, Chicago, Ill.

Dear Sir:

Receipt is acknowledged of yours of May 10th in response to ours of May 9th enclosing a copy of our letter of even date therewith to officials of various line haul carriers now publishing rates to, and making deliveries of live stock at, Union Stock Yards Station, Chicago, Ill. as described in their respective tariffs lawfully on file with the Interstate Commerce Commission.

We have passed the information contained in your letter on to each of the respective line haul carriers as per copy of letter attached hereto.

You are hereby advised that any and all live stock which on or after May 25th, 1933, may be delivered to you by said carriers as their agent for unloading (as provided in your tariff No. 5, I.C.C. No. 8) and for delivery to us as consignee in accordance with the respective contracts of carriage covering the same, will be accepted and received by us from said carriers, (or from you as their agent) and promptly removed from your premises after such acceptance and receipt.

You are further notified that as to such stock, we do not desire, and will not accept, receive or pay for any service or use of facilities beyond the unloading pens which you provide for the carriers as their agent.

You are further notified that on and after said date

you have no authority to accept, handle, or receipt for such live stock, after unloading, and until delivery to us, as our agent, on our behalf, in our name or for our account.

You are further advised that at the time such stock is delivered to you by said carriers as their agent, most of the said shipments will be interstate commerce and will continue to be in interstate commerce until said contracts of carriage are fully performed by delivery of the lading covered thereby to us, the consignee thereof. We will hold you strictly accountable for any interference therewith or for any delay in the prompt delivery thereof in accordance with said contracts for interstate carriage.

Any payments which may be made by us to you on and after May 25th, 1933, on such shipments will be made under protest, solely for the carriers account, and in mitigation of damages caused by the carriers failure to make delivery of said stock to us as required by their respective contracts of lading covering such shipments.

The foregoing notice applies to shipments billed to Armour and Company as such, or operating under the trade name of Morris & Company.

Yours very truly,
(Signed) F. W. Ellis,
Vice-President.

24 State of Illinois, } ss.
County of Cook. }

Removal Order.

IN THE CIRCUIT COURT OF COOK COUNTY.

Armour and Company, a corporation, *Plaintiff,*
vs.
The Alton Railroad Company, a Corporation, *et al.*, *Defendants.*

In Chancery.
No. 38-8417.

ORDER.

This Cause coming on to be heard upon the several petitions, and amendments thereto,

The Alton Railroad Company,

The Atchison, Topeka and Santa Fe Railway Company,

The Baltimore and Ohio Railroad Company,
The Chesapeake and Ohio Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company,
Charles P. Megan, Trustee of Chicago and North Western Railway Company,
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee),
Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company,
H. R. Kurrie and Holman B. Pettibone, Trustees, Chicago, Indianapolis and Louisville Railway Company,
Norman B. Pitcarin and Frank C. Nicodemis, Jr., as Receivers of Wabash Railway Company, a corporation,
The Cleveland, Cincinnati and St. Louis Railway Company, (The New York Central Railroad Company, Lessee),
Chicago and Erie Railroad Company,
Grand Trunk Western Railroad Company,
Illinois Central Railroad Company,
The Michigan Central Railroad Company, (The New York Central Railroad Company, Lessee),
Minneapolis, St. Paul & Saulte Ste. Marie Railway Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The Pennsylvania Railroad Company,
Pere Marquette Railway Company,

defendants herein appearing specially and solely for the purpose of removing the above entitled cause to the District Court of the United States in and for the Northern District of Illinois, Eastern Division; and said defendants having presented to the court their several petitions, and amendments thereto, and bonds for the removal of said cause as aforesaid; and it appearing to the court that notice of the filing of said petitions, and amendments thereto, and bonds, has been served upon the attorneys for the plaintiff, and the court having read and accepted said petitions, and amendments, and having examined said bonds and being fully advised in the premises,

It Is Hereby Ordered that said bonds, and each of them, are hereby accepted and approved as good and sufficient, both as to form and as to surety.

It Is Further Ordered that this cause be and the same is hereby transferred to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It Is Further Ordered that the Clerk of this court do transmit to the District Court of the United States for the Northern District of Illinois a full and complete transcript of all papers and pleadings filed in this cause and of all orders entered and made of record herein.

Enter:

John Prystalski,
Judge.

Dated; July 14, 1938.

Filed Sept. 13, 1938.

26 And on, to wit, the 13th day of September, 1938, came the defendants, Patrick H. Joyce and Luther M. Walker, Trustees, etc., by their attorneys and filed in the Clerk's office of said Court their certain Motion To Dismiss Bill Of Complaint, in words and figures following, to wit:

27 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—16171) * *

MOTION TO DISMISS BILL OF COMPLAINT.

Now come Patrick H. Joyce and Luther M. Walter, as Trustees of the property of Chicago Great Western Railroad Company, defendants herein, by Bryce L. Hamilton, their solicitor, and move the court to dismiss the bill of complaint herein upon the following grounds:

1. The complaint herein puts in issue the questions of what constitutes the transportation and delivery of live stock by railroad in interstate and intrastate commerce to the Union Stock Yards at Chicago, Illinois, which is a public stockyard, and requires a determination of those questions before any other issue presented by said complaint can be determined or adjudicated. The questions of what constitutes such transportation and delivery are administrative questions, committed by federal and state law to the primary jurisdiction of the Interstate Commerce Commission and the Illinois Commerce Commission.

The complaint herein does not allege that there has been any determination by the Interstate Commerce Commission or the Illinois Commerce Commission of the ques-
28 tions of what constitutes the transportation and delivery of the shipments mentioned in said complaint, and in the absence of such determinations this court has no jurisdiction to determine said issues or to proceed further herein.

2. This court has no jurisdiction as to the subject matter of the complaint in so far as it relates to these defendants because they were improperly included in the order of removal entered by the Circuit Court of Cook County.

Wherefore, these defendants pray that the complaint be dismissed as to them.

Bryce L. Hamilton,
Solicitor for said Defendants.
1400—38 So. Dearborn Street,
Chicago, Illinois.

29 And on, to wit, the 26th day of August, 1938 came the Receivers, etc., Defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr., by their attorneys and filed in the Clerk's office of said Court their certain Motion to Dismiss Complaint in words and figures following, to wit: Filed Aug. 26, 1938.

30 In the District Court of the United States.
* * (Caption—16171) * *

MOTION OF THE DEFENDANTS, NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., AS RECEIVERS OF WABASH RAILWAY COMPANY, A CORPORATION, TO DISMISS THE COMPLAINT HEREIN.

Now come the Defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, a Corporation, by Hay, Morton & Freytag, their attorneys, and move the Court to dismiss the complaint and each and every cause of action purported to be alleged therein, and in support of said motion show as follows:

I. The complaint herein puts in issue the questions

of what constitutes the transportation and delivery of livestock, by railroad in intrastate and interstate commerce to the Union Stock Yards at Chicago, Illinois, which is a public stock yard, and requires a determination of those questions before any other issue presented by said complaint can be determined or adjudicated. The questions of what constitutes such transportation and delivery are administrative questions, committed by state and federal law to the primary jurisdiction of the Interstate Commerce Commission and the Illinois Commerce Commission. The complaint herein does not allege that there has been any determination by the Illinois Commerce Commission or the Interstate Commerce Commission
31 of the questions of what constitutes the transportation and delivery of the shipments mentioned in said complaint, and in the absence of such determinations this Court has no jurisdiction to determine said issues or to proceed further herein.

2 The complaint shows on its face that this Court cannot entertain this suit since there has been no prior finding by the Interstate Commerce Commission as to the Plaintiff's damages.

3. The complaint shows that there is a defect and nonjoinder of parties necessary and indispensable to the maintenance and determination of this suit in that The Union Stock Yard and Transit Company of Chicago, a Corporation, has not been joined as a party.

4. It appears on the face of the complaint that it does not state a valid cause of action against these Defendants.

Wherefore these Defendants pray that the complaint and each and every purported cause of action therein alleged be dismissed as to them, and that said Defendants may be hence dismissed with their costs in this behalf incurred; and for such other and further relief as to this Court may seem just.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, a Corporation,

By Hay, Morton and Freytag,
Their Attorneys.

39 S. La Salle Street, Chicago, Ill.,
Franklin 1580.

32 And on, to wit, the 26th day of August, 1938, came the defendants, The Alton Railroad Co., et al., by their attorneys and filed in the Clerk's office of said Court their certain MOTION TO DISMISS COMPLAINT in words and figures following, to wit: Filed Aug. 26, 1938.

33 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—16171) * *

Motion of Defendants The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago, Burlington & Quincy Railroad Company, The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company, The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago and Erie Railroad Company, Grand Trunk Western Railroad Company, Illinois Central Railroad Company, The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Pere Marquette Railway Company, and The Pennsylvania Railroad Company, to Dismiss the Complaint Herein.

Now come the defendants The Alton Railroad Company, a Corporation, The Atchison, Topeka and Santa Fe Railway Company, a Corporation, The Baltimore and Ohio Railroad Company, a Corporation, The Chesapeake and Ohio Railway Company, a Corporation, Chicago, Burlington & Quincy Railroad Company, a Corporation, The Chicago River and Indiana Railroad Company, a Corporation, as Lessee of Chicago Junction Railway Company, The New York Central Railroad Company, a Corporation, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago and Erie Railroad Company, a Corporation, Grand Trunk Western Railroad Company, a
34 Corporation, Illinois Central Railroad Company, a Corporation, The New York Central Railroad Company, a Corporation, as Lessee of The Michigan Central Railroad Company, The New York Central Railroad Company, a Corporation, The New York, Chicago and St. Louis Railroad Company, a Corporation, Pere Marquette Rail-

way Company, a Corporation, and The Pennsylvania Railroad Company, a corporation, by Sidley, McPherson, Austin & Burgess, their attorneys, and move the Court to dismiss the complaint and each and every cause of action purported to be alleged therein, and in support of said motion show as follows:

(1) This Court has no jurisdiction over the subject matter of this suit because the complaint shows on its face that said suit was commenced in the Circuit Court of Cook County, Illinois; said Circuit Court of Cook County, Illinois, does not have and has never had jurisdiction of any cause of action or claim alleged in said suit upon which relief can be granted; and the want of jurisdiction thus created is not affected by removal of said suit to this Court.

(2) The complaint shows on its face that this Court cannot entertain this suit since there has been no prior finding by the Interstate Commerce Commission as to the plaintiff's damages.

(3) The complaint shows that there is a defect and nonjoinder of parties necessary and indispensable to the maintenance and determination of this suit in that The Union Stock Yard and Transit Company of Chicago, a Corporation, has not been joined as a party.

(4) It appears on the face of the complaint that it
35 does not state a valid cause of action or claim upon which relief can be granted, against these defendants or any of them.

Wherefore these defendants pray that the complaint and each and every purported cause of action therein alleged be dismissed as to them, and as to each of them, and that said defendants may be hence dismissed with there respective costs in this behalf incurred; and for such other and further relief as to this Court may seem just.

The Alton Railroad Company,
The Atchison, Topeka and Santa Fe Railway Company,
The Baltimore and Ohio Railroad Company,
The Chesapeake and Ohio Railway Company,
Chicago, Burlington & Quincy Railroad Company,
The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company,
The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Chicago and Erie Railroad Company,
Grand Trunk Western Railroad Company,
Illinois Central Railroad Company,

The New York Central Railroad Company, as Lessee of
The Michigan Central Railroad Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
Pere Marquette Railway Company, and
The Pennsylvania Railroad Company,
Defendants to the above entitled cause,
By Sidley McPherson,
Austin & Burgess,
Their Attorneys.

Sidley, McPherson, Austin & Burgess,
11 So. La Salle St., Chicago, Ill.,
State 5400.
August 26, 1938.

36 And on, to wit, the 27th day of August, 1938 came the defendants H. R. Kurrie and Holman D. Pettibone, Trustees Etc., by their attorneys and filed in the Clerk's office of said Court their certain Motion to Dismiss in words and figures following, to wit: Filed Aug. 27, 1938.

37 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—16171) * *

MOTION TO DISMISS BILL OF COMPLAINT.

Now come H. R. Kurrie and Holman D. Pettibone, as Trustees of Chicago, Indianapolis and Louisville Railway Company, defendants herein, by Frank H. Towner, their solicitor, and move to dismiss the bill of complaint herein upon the following ground:

The complaint herein puts in issue the questions of what constitutes the transportation and delivery of livestock, by railroad in intrastate and interstate commerce to the Union Stock Yards at Chicago, Illinois, which is a public stock yard, and requires a determination of those questions before any other issue presented by said complaint can be determined or adjudicated. The questions of what constitutes such transportation and delivery are administrative questions, committed by state and federal law to the primary jurisdiction of the Interstate Commerce Commission and the Illinois Commerce Commission. The complaint herein does not allege that there has been any determination by the Illinois Commerce Commission or the Inter-

state Commerce Commission of the questions of what
38 constitutes the transportation and delivery of the shipments mentioned in said complaint, and in the absence of such determinations this court has no jurisdiction to determine said issues or to proceed further herein.

Frank H. Towner,
Solicitor for said Defendants.

Entered May 31, 1939.

39 And afterwards, to wit, on the 31st day of May, 1939, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

40 IN THE DISTRICT COURT OF THE UNITED STATES.

Wednesday, May 31st, A. D. 1939.

Present: Hon. William H. Holly, District Judge.

* * (Caption—16171) * *

The Court having heretofore heard the arguments of counsel and being now fully advised in the premises, It Is Ordered that the defendants' motion to dismiss the above entitled cause be and the same is hereby sustained and it is therefore Ordered that this cause be and the same is hereby dismissed at Plaintiff's costs.

41 And on, to wit, the 31st day of May, 1939 there was filed in the Clerk's office of said Court a certain Memorandum of Judge William H. Holly, in words and figures following, to wit:

42 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—16171) * *

MEMORANDUM.

Armour and Company, an Illinois corporation, engaged in the purchase and slaughter of livestock, filed its complaint in the Circuit Court of Cook County against the Alton Railroad Company and various other railroad companies and trustees of railroad companies praying that the court decree that it is "entitled to delivery of livestock

consigned to it at the Union Stock Yards, Chicago, Illinois, at the unloading pens at the Union Stock Yards at Chicago, Illinois, or at such other point as the same may be tendered, upon plaintiff paying, or making lawful arrangement to pay, the tariff rates and charges of defendants applicable to such shipments without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company or of any other person, firm or corporation"; "that a mandatory injunction be entered requiring the defendants, and
43 each of them, under penalty of the law, on and after a date to be fixed by this court, to provide suitable ingress for Plaintiff to a point at which such livestock is tendered and proper and reasonable egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to plaintiff at the Union Stock Yards in Chicago, Illinois, without the payment of any charge or charges therefor by the Plaintiff to the Stock Yards Company, or any other person, firm or corporation, save and except the said rate for transportation for said livestock, lawfully applicable thereto," and for an accounting as to monies therefor paid by plaintiff to the Union Stock Yards Company for yardage and other charges.

Each of the defendants has filed a motion to dismiss. The corporate defendants set up as ground therefor that the questions raised by the complaint are questions over which the Interstate Commerce Commission and the Illinois Commerce Commission have primary jurisdiction, and until those questions have been decided by the Commission in favor of the plaintiff neither the State nor Federal Court may entertain the suit, and further, that there is a defect and non-joinder of a party indispensible to the suit in that the Union Stock Yards and Transit Company of Chicago has not been joined as a party. Further, the trustee defendants have moved to dismiss on the ground that the corporations which they represent are in the process of reorganization under Section 77 of the Bankruptcy Act; that leave has not been granted to plaintiff in those proceedings to bring this action and that the action may not be maintained without such leave having first been granted.

44 The facts as set forth in the complaint are as follows:

Plaintiff is engaged in the purchase and slaughter of livestock and the processing and sale of meats derived there-

from, operating a plant for such purpose in the City of Chicago, Illinois, adjacent to the properties of the Union Stock Yards and Transit Company (hereinafter referred to as the Stock Yards Company. Plaintiff purchases and ships to itself from points in Illinois and other States livestock which is shipped over the railroad lines of defendants consigned to a station of the defendants at the Union Stock Yards at Chicago. This is a joint station used by all of the defendants. It is not on land owned by defendants or any of them but is located on the private property of the Stock Yards Company. This station had been so used as such common depot or station for the receiving, loading, unloading and delivery of ordinary livestock and included loading and unloading platforms, chutes, chute pens, alleys and storage pens and other facilities necessary to the shipment, receipt for shipment or delivery of livestock transported by rail, all of which facilities are and for many years have been located adjacent to the rails used by each of the defendants' trains in reaching said Union Stock Yards and into which facilities inbound shipments of livestock are unloaded, and from which facilities delivery of such livestock consigned to said station is tendered to consignees after such unloading. The said unloading platforms, chutes, chute pens, alleys and storage pens at said station have been for many years and are now owned and operated by said Stock Yards Company. The Union Stock Yards Company is and has been since December 30, 1931, a public stockyard posted as such by the Secretary of Agriculture pursuant to the provisions of Section 302 of
45 the "Packers and Stockyards Act, 1921" U. S. C. A. Title 7, Chapter 9, Section 202, and the defendants have for many years had, and still have, an arrangement with the Stock Yard Company whereby said company would act and has acted and still acts as their agent in receiving cars, unloading from cars and holding livestock in its pens at the Union Stock Yards until delivery thereof could be tendered to or taken from said Stock Yards by the consignee.

For many years each of said defendants have transported livestock in car loads to said station with their own respective engines and crews to the railroad track immediately adjacent to the unloading platforms of the Stock Yard Company and have there delivered possession of such shipments on the track in cars to said Stock Yard Company and engaged the Stock Yard Company as their agent to unload such livestock from said cars and to other-

wise complete each transportation contract of the respective defendants with respect to livestock consigned to the Union Stock Yards and has paid the Stock Yards Company for such unloading and placing the livestock in pens.

Prior to May 25, 1933, plaintiff for many years has made shipments of livestock to itself at the Union Stock Yards Company which the Stock Yards Company was authorized to accept and hold for plaintiff or store or drive to plaintiff's packing plant as plaintiff's agent after the transportation thereof by unloading and placing in the pens had been completed.

But on May 9, 1933, plaintiff notified each of the defendants and the Stock Yards Company in writing that on and after May 25, 1933, it would accept delivery on all
shipments of livestock consigned to it either at the
46 unloading chutes or at such other point at which delivery of livestock was tendered by defendants and would remove the livestock from the point of delivery within a reasonable time after such delivery; and that on and after said date it would not pay the defendants or to the Stock Yards Company any charges on livestock accepted and removed by it save and except the charges lawfully applicable for the transportation thereof; that on May 10, 1933, the Stock Yards Company notified plaintiff in writing that it had received said notice but that it would demand the payment of certain yardage charges alleged to be due it on all livestock at said station and placed in possession of said Stock Yards Company by any or all defendants; that no one of the defendants owned or maintained any pens or other facilities at said station through which livestock unloaded by said Stock Yards Company could be delivered to plaintiff without payment of the charge over and above the rates and charges named in defendants' tariffs for transportation, and that on and after May 25, 1933, said Stock Yards Company would refuse to deliver to plaintiff livestock of plaintiff coming into the possession of it, the Stock Yards Company, as carriers' agent for unloading, unless and until plaintiff paid or promised to pay to the Stock Yards Company the charges demanded by said Stock Yards Company over and above all charges for transportation by defendants.

Thereafter on May 16, 1933, plaintiff notified each of the defendants of the demands of said Stock Yards Company,
and that on and after May 25, 1933, the Stock Yards
47 Company would not have authority, after unloading such livestock, to accept or receipt therefor in plain-

tiff's name or for its account; that any delivery of plaintiff's livestock by any defendant to the Stock Yards Company (other than delivery as defendants' unloading and delivery agent) would constitute a conversion of plaintiff's property and that any payment made by plaintiff in order to gain possession of its property from said Stock Yards Company would be made under protest for account of defendant who had placed the livestock in possession of the Stock Yards Company, and in mitigation of damages. At the same time plaintiff notified the Stock Yards Company that on and after May 25, 1933, it would accept delivery of such livestock at the unloading chutes or any other point where tender thereof was made and promptly remove the same from the premises of the Stock Yards Company and that on and after said date plaintiff did not desire and would not accept, receive or pay for any service rendered to, or facilities used by said Stock Yards beyond the point at which it was ready and willing to accept said livestock when and where tendered, and from which it was ready and willing to promptly remove such livestock from the point of delivery.

Each defendant well knew that it could not fully perform its contracts for the transportation of shipments of livestock to said Union Stock Yards, and for delivery thereof to the plaintiff at such station, save by use of the pens, platforms, chutes and other facilities of said Stock Yards Company and well knew before it delivered possession of said livestock to said Stock Yards Company for unloading from cars that said Stock Yards Company would unload, hold and tender delivery of the same at a point which
48 was accessible to plaintiff only by crossing other property of said Stock Yards Company and from which, after tender and acceptance of possession, no egress could be had by plaintiff with its livestock, except by crossing the property of said Stock Yards Company, and well knew that said Stock Yards Company would refuse to complete said transportation contract or surrender possession of said livestock to plaintiff unless and until the plaintiff had paid or promised to pay a toll or charge for crossing the premises of said Stock Yards Company and for driving its animals across said premises after delivery, notwithstanding which defendants, on May 25, 1933, refused, and have since said date continuously refused, to provide or establish at their common station, Union Stock Yards, Chicago, Illinois, any depot or platform, pens, and facilities over and through which plaintiff might accept delivery of,

and from which plaintiff might remove its said shipments, without payment of any toll or charge other than the charges lawfully applicable to the transportation of such livestock, and that the defendants wholly failed to make any arrangement with the Stock Yards Company by virtue of which plaintiff might have free ingress to the point at which the delivery of livestock was tendered and egress from the point of delivery thereof to a public street or other point off the premises of said Stock Yards Company without being compelled to pay a toll or charge over and above the lawful charges for transportation.

Since May 25, 1933, plaintiff has been compelled, in order to obtain delivery of livestock consigned to it and arriving at the Union Stock Yards Company over the lines of defendants to pay a charge made by the Stock Yards Company for keeping such livestock and for ingress to
49 and egress from the yards of said Stock Yards Company. The lines of the defendants, so it is stated in the complaint, constitute all the carriers by rail traversing the livestock production areas within which plaintiff purchases and ships or caused to be shipped livestock to its order at the Union Stock Yards, Chicago, Illinois. Plaintiff at no time has demanded from any defendant or the Stock Yards Company the right to use any specific pens, alleys, runways, overhead drives or tunnels of the Stock Yards Company in accepting delivery or removing livestock from the point at which delivery was tendered to the packing plants of plaintiff but sought only to be permitted to take possession of its shipments of livestock at the unloading point used by the defendants as their depot or station in said Union Stock Yards, or at whatever point therein tendered, and thence remove said shipments of livestock to a public street or to such other point off the premises of said Stock Yards Company as that company or the defendants might designate and by whatever route or means of egress might from time to time be determined by the defendants or the Stock Yards Company.

The gist of the controversy appears to be this: Plaintiff buys at various points in the country and ships to itself over the railroads of defendants livestock destined to the joint station of defendants at the Union Stock Yards, Chicago. Defendants have the duty, under the law of unloading the livestock in pens ready for delivery to the consignee. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 138. Defendants' station is not located on the property of the defendants or any of them, but on the private property of

the Union Stock Yards Company. The defendants employ the Union Stock Yards Company to perform for them the duty of unloading the livestock and putting it in pens, these pens being the property of the Stock Yards Company situated on the private property of that company. Prior to May 25, 1933, the Stock Yards Company stored in their pens the livestock consigned to plaintiff. The live stock was delivered to plaintiff by the Stock Yards Company when called for by plaintiff who paid the Stock Yards Company a charge referred to in the briefs as "Yardage". About ten days prior to the 25th of May, 1933, plaintiff notified the defendants and the Stock Yards Company that it did not desire the services of that company (other than the service of unloading and placing in pens the cost of which was included by defendants in the costs of transportation) and demanded that the defendants deliver the livestock to it and permit it to remove it from the Stock Yards without the payment of any charge in addition to the regular charge for transportation. The defendants refused to take any action other than to deliver the livestock in the pens in the Stock Yards, although they knew, as plaintiff alleges, that the Stock Yards Company would not permit plaintiff to remove its livestock without the payment of the charge for yardage. The Union Stock Yards Company replied simply that it would refuse to deliver the livestock to plaintiff unless and until plaintiff paid the yardage charge. Since May 25, 1933, plaintiff has paid the yardage under protest and under this complaint seeks to recover of the defendants the amounts it has been compelled to pay to the Stock Yards Company to obtain possession of its livestock. It also prays for a mandatory injunction as set out above. The matters for the court to determine are whether the questions presented are primarily for the Illinois and Interstate Commerce Commissions rather than for the court, and whether the Stock Yards Company is a necessary party. There is also the question whether this suit may be maintained against the trustee without first obtaining leave of the court or courts which appointed them.

First. If this were a suit to recover merely a charge for transportation in excess of the tariff rates approved by the Interstate Commerce Commission, plaintiff could maintain its action. *Great Northern Ry. Co. et al.* v. *Merchants Elevator Co.*, 259 U. S. 285. But in that case the court said:

"Whenever a rate, rule or practice is attacked as

unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function of being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

This case seems to me to come squarely within the rule there laid down. Here the defendants have made no charge in excess of the established rates. They have received no money other than that to which they were entitled for the carriage of the livestock. The stock was carried to the
52 station designated by the shipper. It was unloaded and placed in pens in the manner that had been customary for many years prior to May 25, 1933, and to which plaintiff assented prior to the giving of the notice mentioned in the complaint. Plaintiff has long known that the Union Stock Yards station of defendants was on the property of the Union Stock Yards and Transit Company. It knew that the livestock when taken from the cars was put in pens located on the property of and owned by the Stock Yards Company. It now demands that the livestock be delivered directly to it and that it be given the right of ingress to and egress from the property of the Stock Yards Company without being required to make payment to that

company. Its demand may be proper and reasonable, but that is a question of administration for the Interstate Commerce Commission and Illinois Commerce Commission. It may well be that if a railroad establishes its station upon private property it is bound to make such arrangements with the owners of the property that consignees of freight may, without payment of fee to the owner of the ground, have access to the station for the removal of the freight. Ordinarily, such service would be required.

But here we have a situation where for many years plaintiff and other shippers have consigned and are now consigning their stock to the Union Stock Yards station knowing that after the unloading of the stock and placing it in pens it could not be removed to their processing establishments without the use of the facilities owned by the Stock Yards Company. Whether there are other stations in Chicago of the defendants provided with facilities
53 for the delivery of livestock and which plaintiff might use does not appear of record. It is possible that the solution of the problem is to require the railroads to provide proper stations on their own property or adjacent to plaintiff's plant. *Covington Stock Yards Co.* v. *Keith, supra.* All these are questions for the Commerce Commissions of the State and Federal governments.[1]

Plaintiff urges the court to take jurisdiction of this case because under the doctrines of *Proctor & Gamble* v. *United States,* 225 U. S. 282, if it were to go to the Interstate Commerce Commission and be denied relief, no matter how erroneous the ruling of the Commission, plaintiff would have no right to appeal. Whatever fears the plaintiff may have had on this score would seem to have been set at rest, in my opinion, by the Supreme Court in *Rochester Telephone Corporation* v. *United States, et al.,* decided April 17, 1939, not yet officially reported.

This is a case for the Commerce Commissions and not for the court, and for that reason the complaint should be dismissed.

Second. Is the Union Stock Yards and Transit Company an dispensable party to this litigation? In my opinion it is. Plaintiff prays for a mandatory injunction compelling defendants to provide plaintiff suitable ingress to the yards of the Stock Yards Company, and egress from the

(1) *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Texas & Pac. Ry. Co.* v. *American Tie Co.,* 234 U. S. 133; *Loomis* v. *Lehigh Valley R. R. Co.;* 240 U. S. 43; *Midland Valley R. R. Co.* v. *Barkley,* 276 U. S. 482; *Adams* v. *Mills,* 286 U. S. 397

yards with its livestock without payment of any
54 charge. How the court, not having jurisdiction of the Stock Yards Company, could enforce such an order plaintiff does not explain. Because of the non-joinder of the Stock Yards Company the complaint should be dismissed.

Third. The trustee defendants, trustees of the various railroad corporations, appointed under the provisions of Section 77 of the Bankruptcy Act assert that plaintiff cannot maintain an action of this nature against them without leave of the courts that appointed them. Plaintiff relies on Section 66 of the Judicial Code (Title 28, Sec. 125 U. S. C. A.) I am of the opinion that the section relied upon does not authorize the maintenance of such an action as this. *Barton* v. *Barbour,* 104 U. S. 126, *Ex Parte Baldwin,* 291 U. S. 610, *Merryweather* v. *U. S.* 12 F. (2d) 407.

The motions of the defendants to dismiss the complaint will be sustained. An order will be entered accordingly May 31st, 1939.

William H. Holly,
Judge.

55 And on, to wit, the 12th day of July, 1939 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit: Filed July 12, 1939.

56 In the District Court of the United States.

* * (Caption—16171) * *

NOTICE OF APPEAL.

Notice is hereby given that Armour and Company, a corporation, plaintiff appellant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the 7th Circuit from the final judgment of the court entered in this action on May 31, 1939, dismissing the complaint of the plaintiff appellant herein.

Chicago, Illinois, July 7th, 1939.

(Sgd.) Chas. J. Faulkner, Jr.,
(Sgd.) W. C. Kirk,
(Sgd.) Paul E. Blanchard,
Attorneys for Armour and Company, Plaintiff.

Office address: Armour Building.
Union Stock Yards,
Chicago, Illinois.
Telephone: Yards 4745.

Filed July 12, 1939.

57 And on, to wit, the 12th day of July, 1939 came the Plaintiff by their attorneys and filed in the Clerk's office of said Court their certain Bond on Appeal in words and figures following, to wit:

58 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—16171) * *

BOND ON APPEAL.

59 Know All Men By These Presents:

That we, Armour and Company, a corporation, as principal, and Maryland Casualty Company, a corporation, as surety, are held and firmly bound unto The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company; as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, in the full and just sum of Two Hundred and

Fifty Dollars to be paid to the said The Alton Rail-
60 road Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand nine hundred and thirty-nine.

61 Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, in a suit pending in said Court, between Armour and Company, plaintiff, and The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles F. Megan, Trustee of Chicago and

North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, defendants, a decree was rendered against the said Armour and Company, and the said Armour and Company, having filed its notice of appeal to the
62 United States Circuit Court of Appeals for the Seventh Circuit in the Clerk's Office of the said District Court to reverse the decree of the aforesaid suit;

Now, the condition of the above obligation is such, that if the said Armour and Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its appeal good then the above obligation to be void; otherwise to remain in full force and virtue.

Armour and Company,
By J. B. Scott, (Sgd.)
(Seal) *Vice-President.*
Attest:
J. A. Brown, (Sgd.)
Asst. Secretary.

Maryland Casualty Company,
By J. A. Lemmen, Jr., (Sgd.)
(Seal) *Atty. in fact.*
Attest:
L. Buhway. (Sgd.)

Approved by: _____

_____

63 And on, to wit, the 12th day of July, 1939 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points in words and figures following, to wit: Filed July 12, 1939.

64 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—16171)

STATEMENT OF POINTS.

1. The court erred in its statements of fact alleged and relief prayed for, in the complaint.

2. The court erred as a matter of law, in holding that a simple question of whether, under the facts alleged, Defendants had or had not performed their written contract as common carriers (and the duties imposed by common law, incident thereto), was a question of which the Interstate Commerce Commission had exclusive jurisdiction.

3. The court erred as a matter of law, in holding that Defendants' agent, the Union Stock Yards Company, was a necessary party to the case for the following reasons:

(1) No contract, express or implied, existed between Plaintiff and said Company.

(2) The use of no property or facility of said Company or no service by said Company, was required or demanded by the Plaintiff.

(3) No connection existed between said Company
65 and any shipment involved herein by reason of any act or demand of Plaintiff, but such connection as did exist, arose solely from Defendants' action in refusing to tender said property at any point at said railroad station, except at a point located on the private property of said Company. As a result, no obligation to pay for the use of said facilities or services existed, save on the part of Defendants who had engaged them without Plaintiff's consent, and against its will.

(4) Said Company had no connection with any transaction named in the Complaint, save as the employed agent of Defendants.

4. The court erred in failing to hold that Defendants' action, in willfully and deliberately delivering Plaintiff's property to a third person, against its will and contrary to

its directions, knowing that Plaintiff could never secure possession thereof from such person, save by payment of moneys it had not contracted to pay, for a service it did not need nor want, constituted an unwarranted and willful breach of Defendants' contracts of transportation, to Plaintiff's damage, in the amount paid to recover possession of its own property, and that the Interstate Commerce Commission had no jurisdiction of such question.

5. The court erred in holding that the cause of action stated in the complaint was not one permitted to be brought against the trustee and receiver Defendants without prior consent of the court or courts appointing such trustees or receivers, under Section 66 of the Judicial Code (Title 66 28, Sec. 125 U. S. C. A.). Specifically, the trustee and receiver Defendants referred to are:

Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company.

Charles P. Megan, Trustee of Chicago and North Western Railway Company.

Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company.

H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company.

Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company.

6. The court erred in failing to hold that the cause of action alleged in the complaint was essentially a mere "loss and damage" action, of which the Interstate Commerce Commission had no jurisdiction.

7. The court erred in dismissing the Plaintiff's complaint.

Paul E. Blanchard,
Of attorneys for Plaintiff.

67 And on, to wit, the 12th day of July, 1939 came the Parties by Their attorneys and filed in the Clerk's office of said Court their certain Stipulation as to Record in words and figures following, to wit: Filed July 12, 1939.

68 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—16171) * *

STIPULATION AS TO RECORD.

It is hereby stipulated and agreed by and between Paul E. Blanchard of attorneys for Plaintiff herein, Kenneth F. Burgess, D. Robert Thomas, Douglas F. Smith, Hay, Morton & Freytag, Frank H. Towner, Bryce L. Hamilton, collectively, attorneys for all the Defendants herein, that the following documents, now of record in the Office of the Clerk of the above entitled Court are designated as the parts, and all the parts of the record, and proceedings (there having been no evidence offered), to be included in the record on appeal.

1. The Complaint.
2. Order of removal to Federal Court.
3. Motion of defendants Patrick H. Joyce and Luther M. Walter, Trustees of the property of the Chicago Great Western Railroad Company, to dismiss the Complaint.
4. Motion of defendants Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of the Wabash Railway Company, a corporation, to dismiss the Complaint.
5. Motion of defendants The Alton Railroad Company;
The Atchison, Topeka and Santa Fe Railway Company;
The Baltimore and Ohio Railroad Company;
The Chesapeake and Ohio Railway Company;
Chicago, Burlington & Quincy Railroad Company;
Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company;
Charles P. Megan, Trustee of Chicago and North Western Railway Company;

69 The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company;
The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company;
Chicago and Erie Railroad Company;
Grand Trunk Western Railroad Company;

Illinois Central Railroad Company;

The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company;

The New York Central Railroad Company;

The New York, Chicago and St. Louis Railroad Company;

Pere Marquette Railway Company;

The Pennsylvania Railroad Company;

Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company;

Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, to dismiss the Complaint.

6. Motion of defendants H. R. Kurrie and Holman D. Pettibone as Trustees of Chicago, Indianapolis and Louisville Railway Company, to dismiss the Complaint.

7. Opinion of the Court on motion to dismiss.

8. Order of the Court dismissing the Complaint.

9. Notice of Appeal.

10. Appeal Bond.

11. Plaintiff's Statement of Points relied upon.

12. This Stipulation designating portions of the record to be included in the record on appeal.

Chicago, Illinois, July 7th, 1939.

Paul E. Blanchard,
Of attorneys for Plaintiff.

Kenneth F. Burgess,
Douglas F. Smith,
D. Scott Thomas,
Hay, Morton & Freytag,
By Meyer Morton,
Frank H. Towner,
Bryce L. Hamilton,
Attorneys for Defendants.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. .....

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION,
et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7030

ARMOUR AND COMPANY, A CORPORATION,
Plaintiff-Appellant,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Defendants-Appellees.

Counsel for Plaintiff-Appellant:
MR. CHARLES J. FAULKNER, JR.,
MR. W. C. KIRK,
MR. PAUL E. BLANCHARD.

Counsel for Defendants-Appellees:

U.S.C.C.A. 7
FILED
AUG 18 1939
FREDERICK G. CAMPBELL
CLERK

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED AUG. 1, 1939.
PRINTED RECORD.

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7030

ARMOUR AND COMPANY, A CORPORATION,
Plaintiff-Appellant,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Defendants-Appellees.

Counsel for Plaintiff-Appellant:
MR. CHARLES J. FAULKNER, JR.,
MR. W. C. KIRK,
MR. PAUL E. BLANCHARD.
Counsel for Defendants-Appellees:

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable William H. Holly, District Judge of the United States for the Northern District of Illinois on 31st day of May, in the year of our Lord one thousand nine hundred and thirty-nine, being one of the days of the regular May Term of said Court, begun Monday, the 1st day of May, and of our Independence the 163rd year. Placita.

Present:

Honorable William H. Holly.
William H. McDonnell, U. S. Marshal.
Hoyt King, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Armour and Company, a corporation,
Plaintiff,

vs.

The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago, Burlington & Quincy Railroad Company, Charles M. Thomson, Trustee of Chicago Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; H. R. Kurrie and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Norman B. Pitcairn, Frank C. Nicodemus, Jr., and Walter Franklin, Receivers of Wabash Railway Company,
Defendants.

No. 16171.

Be It Remembered, that the above-entitled action was commenced by the filing of Transcript of Record from the Circuit Court of Cook County in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 29th day of July, 1938, of which the following Complaint and Order for Removal are portions thereof.

70 Northern District of Illinois, } ss.
Eastern Division: }

I, Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled Armour and Company, a corporation *vs.* The Alton Railroad Company, *et al.*, No. 16171 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 1st day of August, A. D. 1939.

Hoyt King,
Clerk.

(Seal)

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 63, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the eighteenth day of August, 1939, upon which the following entitled cause was heard and determined:

Armour and Company,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, *et al.*,
Defendants-Appellees,

No. 7030, October Term, 1939, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of June, A. D. 1940.

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-third.

Armour and Company,
Plaintiff-Appellant,
7030 *vs.*
The Alton Railroad Company, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the first day of August, 1939, there was filed in the office of the Clerk of this Court, an appearance of Counsel for plaintiff-appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1939.

Armour & Co.,

vs.

The Alton Railroad Co., *et al.*

The Clerk will enter my appearance as counsel for the Plaintiff-Appellant.

Chas. J. Faulkner, Jr.,
W. C. Kirk,
Paul E. Blanchard,
Armour Bldg., U. S. Yards,
Chicago, Ill.,
Phone Yards 4745.

Endorsed: Filed August 1, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the ninth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendants-appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1939.

Armour and Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

The Clerk will please enter the following appearances as counsel for the following appellees:

The Alton Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago River and Indiana Railroad Company, as Lessee of Chicago Junction Railway Company; The New York Central Railroad Company, as Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Chicago and Erie Railroad Company; Grand Trunk Western Railroad Company; Illinois Central Railroad Company; The New York Central Railroad Company, as Lessee of The Michigan Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Pere Marquette Railway Company, and The Pennsylvania Railroad Company; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Charles P. Megan, Trustee of Chicago and North Western Railway Company; Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Com-

pany; and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company.

Kenneth F. Burgess,
Douglas F. Smith,
D. Robert Thomas, Jr.,
11 South LaSalle Street,
Chicago, Illinois.

Endorsed: Filed September 9, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourteenth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendants-appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1938.

Armour & Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

The Clerk will enter my appearance a scounsel for Patrick H. Joyce and Luther M. Walter, as Trustees of the property of Chicago Great Western R. R. Co.

Bryce L. Hamilton,
1400 First National Bank Bldg.,
Chicago, Illinois.

Endorsed: Filed September 14, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourteenth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendant-appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030, October Term, 1938.

Armour & Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

The Clerk will enter my appearance as counsel for Holman D. Pettibone, as Trustee of the property of Chicago, Indianapolis & Louisville Ry. Co.

Frank H. Towner,
1400 First National Bank Bldg.
Chicago, Illinois.

Endorsed: Filed September 14, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for defendants-appellees, which said appearance is in words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030. October Term, 1939.

Armour and Company, a Corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a Corporation, *et al.*,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for the Defendants, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, a corporation.

Meyer Morton,
Elmer W. Freytag,
39 S. LaSalle Street, Chicago, Ill.

Endorsed: Filed September 27, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fifth day of January, 1940, there was filed in the office of the Clerk of this Court, a supplemental stipulation as to the record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Armour and Company, a corporation,
Plaintiff-Appellant,
vs.
The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.
} No. 7030.

SUPPLEMENTAL STIPULATION AS TO RECORD.

It is hereby stipulated and agreed by and between Paul E. Blanchard, of attorneys for plaintiff-appellant herein, Hay, Morton & Freytag, Frank H. Towner, Bryce L. Hamilton, Kenneth F. Burgess, Douglas F. Smith, and D. Robert Thomas, collectively attorneys for all the defendants-appellees herein, that the following document, now of record in the office of the Clerk of the District Court of the United States, is designated as part of the record to be included in the record on appeal in this cause:

Special and limited appearance and motion of defendants Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company, Charles P. Megan, Trustee of Chicago and North Western Railway Company, Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island and Pacific Railway Company, to dismiss the complaint herein for want of jurisdiction over them or any of them.

Chicago, Illinois, January 24th, 1940.

Paul E. Blanchard,
Of Attorneys for Plaintiff-Appellant.
Hay, Morton & Freytag,
Frank H. Towner,
Bryce L. Hamilton,
Kenneth F. Burgess,
Douglas F. Smith,
D. Robert Thomas,
Attorneys for Defendants-Appellees.

Endorsed: Filed January 25, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of January, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 30, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

Armour and Company, *Plaintiff-appellant,* vs. The Alton Railroad Company, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

7030

It is ordered that the stipulation of counsel, filed on January 28, 1940, providing that a certain special and limited appearance and motion be included in the record on appeal herein, be, and it is hereby, approved.

And afterwards, to-wit: On the thirtieth day of January, 1940, there was filed in the office of the Clerk of this Court, a special and limited appearance, etc., which said special and limited appearance is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Armour and Company, a corporation, *Plaintiff,* *vs.* The Alton Railroad Company, a Corporation, *et al.,* *Defendants.*	In Equity. No. 16171.

SPECIAL AND LIMITED APPEARANCE AND MOTION OF DEFENDANTS CHARLES M. THOMSON, TRUSTEE OF CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, CHARLES P. MEGAN, TRUSTEE OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, HENRY A. SCANDRETT, WALTER J. CUMMINGS, AND GEORGE I. HAIGHT, TRUSTEES OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, AND FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, TO DISMISS THE COMPLAINT HEREIN FOR WANT OF JURISDICTION OVER THEM OR ANY OF THEM.

Now come the defendants Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company, Charles P. Megan, Trustee of Chicago and North Western Railway Company, Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, and appearing specially and for the sole and only purpose of making this motion, by Sidley, McPherson, Austin & Burgess, their attorneys, move the Court to dismiss the complaint and each and every cause of action purported to be alleged therein, and in support of said motion show as follows:

The complaint shows upon its face that this Court does not have jurisdiction over said defendants or any of them in that they and each of them are Trustees appointed under and pursuant to Section 77 of the Bankruptcy Act of the United States, as amended, and that the necessary authority or consent to institute or prosecute this suit has not been obtained.

Wherefore these defendants, appearing specially and for the sole and only purpose of making this motion, pray that the complaint and each and every purported cause of action therein alleged may be dismissed as to them, and as to each of them, and that said defendants and each of them may be hence dismissed with their costs in this behalf incurred; and for such other and further relief as to the Court may seem just.

Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company;
Charles P. Megan, Trustee of Chicago and North Western Railway Company;
Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and
Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company,
Defendants to the above entitled cause,
By Sidney, McPherson, Austin and Burgess,
Their Attorneys.

Sidley, McPherson, Austin & Burgess,
11 So. La Salle St., Chicago, Ill.
State 5400.
August 26, 1938.

Certified Copy.

United States of America, } ss.
Northern District of Illinois. }

I, Hoyt King, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy

of the original Special and Limited Appearance and motion of Defendants to dismiss the complaint for want of jurisdiction, filed August 26, 1938, in the case of Armour and Company, Plaintiff, *vs.* The Alton Railroad Company, Defendants, General No. 16171, In Equity, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago this 9th day of October, A. D. 1939.

Hoyt King,
Clerk.

(Seal)

By Edward E. Douglas,
Deputy Clerk.

Endorsed: Filed January 30, 1940. Frederick G. Campbell, Clerk.

And afterward, to-wit: On the eighth day of February, 1940, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 8, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

	Armour and Company, *Plaintiff-appellant,*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
7030	*vs.*	
	The Alton Railroad Company, *et al.,* *Defendants-appellees.*	

Now this day comes the parties by their counsel and this cause comes on to be heard on the transcript of record and briefs of counsel and on oral argument by Mr. Paul E. Blanchard, counsel for appellant, and by Mr. Douglas F. Smith, counsel for appellees, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the fourth day of April, 1940, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030. OCTOBER TERM, 1939, JANUARY SESSION, 1940.

ARMOUR AND COMPANY,
Plaintiff-Appellant,
vs.
THE ALTON RAILROAD COMPANY, A Corporation, *et al.*,
Defendants-Appellees.

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 4, 1940.

Before SPARKS, TREANOR, and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is an appeal from a judgment of the District Court dismissing a complaint filed by Armour and Company, an Illinois corporation, engaged in the purchase and slaughter of livestock. 27 F. Supp. 625. Armour commenced this suit in the Circuit Court of Cook County against the Alton Railroad and various other railroad companies, hereafter also referred to as the "carriers." On July 14, 1938, the suit was removed to the Federal Court and therein filed on July 29, 1938. The defendant carriers moved to dismiss the complaint, the District

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Matter stricken or printed in italics are changes in opinion pursuant to order of May 21, 1940.

Court entered a judgment of dismissal, and Armour appealed to this Court.[1]

Armour and Company operates a packing plant adjacent to the public stockyards which are located at 39th Street and Racine Avenue, Chicago. These yards (constructed in 1865) are owned and operated by the Union Stock Yard and Transit Company of Chicago, hereafter referred to as the "Yards Company." Armour buys livestock in Illinois and other states, ships by rail to itself at Union Stock Yards, Illinois (the railroad station named in the tariffs), and pays the line-haul rate specified therein. Livestock consigned to this station is delivered by the defendant carriers at their common livestock depot, the yards of the Yards Company.

Prior to 1865 livestock shipped to Chicago packers was delivered by the various carriers at different places in the city. These places were not equipped with facilities for delivering livestock in any great quantity. After 1865, by the common action of the carriers and by arrangement with the Yards Company, the yards of this company became the ~~*only*~~ *usual* place in Chicago at which livestock ~~*could ordinarily*~~ *was* be delivered. Down through the years these yards continued to be the common livestock depot of all the carriers, and delivery was *ordinarily* made there. In expressing the same thought the Supreme Court described the yards as the "terminals of the line-haul carriers." *Adams* v. *Mills*, 286 U. S. 397, 409. See also *I. C. C.* v. *C. B. and Q. R. R. Co.*, 186 U. S. 320.

Thus it came to pass that these yards—providing such facilities as loading and unloading platforms, chutes and alleys, unloading and holding pens, and other livestock conveniences—became the common livestock depot of the defendant carriers. The Yards Company in supplying its yards, performs there the transportation services which the carriers are under a duty to render. Serving in this capacity it is the agent of the carriers and a common car-

1. Some of the carriers are or were in the process of reorganization under Section 77 of the Bankruptcy Act, 11 U. S. C. Sec. 205, and are or were represented by receivers or trustees. These defendants moved to dismiss on the additional ground that Armour failed to obtain the consent of the Bankruptcy Courts to bring this suit against them.

In general the corporate defendants moved to dismiss on two grounds: (1). The complaint raised questions involving the exercise of administrative discretion, and hence the *Abilene* doctrine was applicable. 204 U. S. 426; (2). Armour failed to join the Union Stock Yard and Transit Company of Chicago, a corporation, as party defendant.

rier subject to the Interstate Commerce Act. 24 Stat. 379, as amended in 1920, 41 Stat. 474, 49 U. S. C. Secs. 1-41; *U. S.* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Union Stock Yard & Transit Co.* v. *U. S.*, 308 U. S. 213. That it is proper for the carriers to discharge their duty to deliver at the place of destination, in this way, is clear. *Warehouse Co.* v. *U. S.*, 283 U. S. 501, 506.

At the yards employees of the Yards Company unload the livestock into unloading pens located upon the company's property. For this service the company charges the *carriers* a certain rate which is filed with the Interstate Commerce Commission. Since this service is a rail transportation service, rendered by the carriers (through their agent, the Yards Company) for the shipper, the charge therefor is covered by the line-haul rate. *Adams* v. *Mills*, 286 U. S. 397. On the other hand, in addition to and separate from the rendition of rail transportation services, the Yards Company also performs specified stockyard services such as holding, feeding and storing. In rendering such a special service the company is subject to the Packers and Stockyards Act, and for such services charges the *packer* a certain rate which is filed with the Secretary of Agriculture. 42 Stat. 159, 7 U. S. C. Secs. 181 *et seq.*, 201 (b), 226.

It might be said that in the rendition of a transportation service the Yards Company acts as agent of the carriers, but that in the performance of a stockyard service it acts as agent of the packer. *Adams* v. *Mills, supra; Union Stock Yard & Transit Co.* v. *U. S., supra; Burton* v. *Wabash Ry. Co.*, 58 S. W. (2) (Mo.) 443, 447 It has also been said that "Stockyard services do not commence until unloading ends; they end when loading begins." *Denver Stock Yards* v. *U. S.*, 304 U. S. 470, 477. See also *Burton* case, *supra.*

For many years the Yards Company has collected a specified "yardage" fee for all livestock received in the yards, and this charge has been filed with the Secretary of Agriculture. From the complaint and the exhibits attached thereto, it appears that the yardage fee is a per capita charge on all livestock received at the yards. But it does not appear what the exact nature of the service is, for which the charge is assessed. Plaintiff reasons that the charge is necessarily imposed on the privilege of removing the livestock from the unloading pens. Defendants

leave the impression that the charge is levied for the rendition of a stockyard service.[2] In any event, until May 25, 1933, Armour paid this yardage charge without complaint.

In passing we add that the transportation of livestock by rail begins with its delivery to the carrier for loading at point of origin, and ends after unloading for delivery or tender to the consignee at the place of destination.[3] This was the rule at the common law. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136. It is the rule under the Interstate Commerce Act. See *Union Stock Yard & Transit Co.* v. *U. S., supra.* No magic is needed to compel the thought that the mere privilege of immediate removal from the unloading pens, "a mere way out to the public highways," is incidental to and part of the delivery. *Atchison, Topeka & Santa Fe Railway Co.* v. *U. S.*, 295 U. S. 193, 201; See also dissent therein, p. 203.

On May 9, 1933, Armour notified the carriers and their agent, the Yards Company, that after May 25, it would

2. Armour alleges that after May 25, 1933 it did not use extra facilities or special yard conveniences, and that therefore the imposition of the yardage charge was necessarily made for removing the livestock from the unloading pens. As such, it would appear that the charge is for a transportation service.

An attached exhibit (Reply of Union Stockyards Co. to Armour and Company) indicates that the charge is for the use of the yards, and that it is filed with the proper administrative authorities. As such, it would appear that the charge is for a stockyards service.

It is certain that the collection of the yardage charge, made in connection with the use of the yards in effecting delivery of livestock, is a "long existing practice" whose roots lie buried in the history of the stockyards and their use as a common livestock depot of the carriers. *Atchison, T. & S. F. R. Co.* v. *U. S.*, 295 U. S. 193, 199. This charge is applied to all livestock received at the yards. Nor has it been material in the past whether the animals were taken by the consignee immediately from the unloading pens, or from there transferred to holding pens and later taken by the consignee. *Atchison Ry.* case, *supra*, p. 196.

History also tells another story, a story of shipper complaint of practices and abuses indulged in by carriers and Yards Company to the end that terminal charges be added to scheduled carrier rates. See dissent in *Atchison Ry.* Case, *supra*, pp. 206-207. See also f. n. 3.

3. The practice at the Chicago yards, for over fifty years, had been to unload livestock in unloading pens without charge to the consignee. *Adams* v. *Mills*, 286 U. S. 397, 410. This, however, was not the practice prior to 1920 in other public stockyards, *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 295 U. S. 193, 198. Section 15 (5) of the Interstate Commerce Act, enacted in 1920, made the Chicago practice general throughout the United States. 41 Stat. 486, 49 U. S. C. Sec. 15 (5).

Section 15 (5) provides that at public stockyards transportation shall include delivery of inbound shipments into "suitable pens" without extra charge to the consignee. In 1932 the Supreme Court in *Adams* v. *Mills, supra*, declared that the transportation of livestock to the Chicago public stockyards shall include unloading without extra charge, at the same time

accept delivery at the unloading pens and remove the unloaded livestock within a reasonable time thereafter, but would not pay the yardage fee. On May 10 the Yards Company answered that it would insist on the payment as long as the yards were used as the livestock terminal of the carriers. On May 16, Armour notified the carriers of this answer, but collection of the charge continued. However, after May 25, 1933, Armour paid the charge under protest and later instituted the instant case.

Nature of Consignee's Action. In the instant case Armour is not complaining that the line-haul rate is unreasonable, nor for that matter that the yardage charge is unreasonable. In the last analysis of things, it is plain that Armour's claim is based on the theory that the yardage charge is levied on a service, compensation for which is already included in the line-haul rate. We know that as consignee of livestock shipments, plaintiff is entitled to possession of the animals upon the payment of the lawful charges. Therefore, if indeed the carriers through their

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leaving undisturbed the Yards Company's practice of making the yardage charge on all livestock received therein, *Atchison Ry.* case, *supra*, p. 199.

In the meantime, however, the packers had begun to contest the legality of the yardage charges before the Interstate Commerce Commission, and this case became known as the *Hygrade* or *Atchison Ry.* case. The Commission found that no services were rendered after unloading for which the carriers and the Yards Company may assess charges, in instances where delivery is taken at the unloading pens within a reasonable time. 195 I. C. C. 533. On the other hand, the Commission concluded that the yardage charge upon livestock transferred to holding pens was proper.

However, the Commission's order directing discontinuance of the yardage fee in instances where delivery was taken at the unloading pens was set aside, for lack of supporting evidence. *Hygrade* case, *supra*, 295 U. S. 193. The Court was impressed by the consignee's constant use of certain property of the Yards Company, namely, "a route via the overhead runway to the Hygrade plant," and concluded that there was no evidence that in removing the animals from the unloading pens, the consignee used only an egress to the city streets. However, the Court recognized that "Plainly there is an essential difference between the route from the unloading pens to consignee's plant and a mere way out to the public highways."

In this connection, it is material to quote briefly: "The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards (at Chicago) to the city streets by means of which consignee's animals might be removed to its plant * * * Consignee * * * sought free use of the Yards Company's properties, including the overhead runway * * *." *Atchison Ry.* case, *supra*, p. 200. It is to be noted that in the instant case plaintiff has borne these words in mind.

In a recent opinion the Supreme Court said of the *Atchison* or *Hygrade* decision that "There the Commission's order * * * was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish." *Union Stock Yard & Transit Co.* v. *U. S.*, 308 U. S. 213.

corporate agent have exacted an unlawful charge, then the exaction is a tort.

In general Armour alleges that the duty to deliver includes access to and from the unloading pens for the immediate removal of the cattle; this duty was breached. In particular Armour alleges that the yardage charge was imposed in addition to the scheduled tariff rate for the bare privilege of removal: such a charge is unlawful. See f.n. 2 also. In this light the suit here is one for damages occasioned by an alleged overcharge, the amount of which equals the yardage charges collected. See *Adams* v. *Mills, supra; Atchison Ry.* case, *supra; U. S.* v. *I. C. C.*, 73 F. (2d) 948.

Armour contends that the complaint in question states a cause of action for damages occasioned by improper delivery. From this Armour reasons that the cause of action is not based upon any violation of the Interstate Commerce Act, and hence the Interstate Commerce Commission is without jurisdiction. We cannot agree with Armour's major premise. In the paragraphs above, regard was given to the substance of the transactions alleged in the complaint. For example, it is obvious that the instant case is not a mere "loss and damage" suit. It is not necessary to say more, except that the question at all times is one not of form but of actuality.

In substance the complaint states a claim based on overcharge, plainly a violation of the statute. Section 6 (7) reads as follows: "* * * nor shall any carrier charge or * * * collect * * * a greater * * * compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates * * * specified (therein) * * *." Ordinarily the Courts and the Commission have concurrent jurisdiction over claims based on overcharge; therefore the difference of opinion between Armour and us as to the nature of the cause of action alleged, does not necessarily dispose of the case adverse to Armour's interest. *Southern R. Co.* v. *Eichler*, 56 F. (2d) 1010; *Barrett* v. *Gimbel Bros.*, 226 F. 623, 631; *Kansas City So. Ry.* v. *Wolf*, 272 F. 681.

Primary Jurisdiction Doctrine. The carriers moved to dismiss chiefly on the ground that the complaint raised administrative problems and hence was subject to the primary jurisdiction of the administrative bodies. Armour

contends that the complaint raised strict legal issues and hence the case was subject to the exclusive jurisdiction of the courts.

Some situations require prior administrative adjudication; other situations permit original resort to the courts. It is said the answer depends upon "the character of the controverted question and the nature of the inquiry necessary for its solution." *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. The Supreme Court has pointed out the line of demarcation many times: the line lies between controversies *which involve issues of law and those* which involve issues essentially of fact or call for the exercise of administrative discretion. See *Great Northern Ry.* case, *supra*, p. 295. But the *Abilene* doctrine, the doctrine of primary jurisdiction, is still more easily stated than applied. *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 264 U. S. 426.

Our great Chicago stockyards go back to 1865 for their origin, and soon thereafter the line-haul carriers began to use these yards as their common livestock depot. And at the same time there came into existence the tri-party relationship between carriers, shippers and Yards Company. That relation continued through the years but not without many disturbing conflicts, as the opinions of the Supreme Court graphically point out. This picture in perspective has been drawn for us, and it paints a story of shipper complaint of practices at the yards, some to the end that forbidden charges be imposed for carrier service. The story told, brings into bold relief the instant controversy between shipper and line-haul carriers and identifies it as its most recent chapter.

In this case the "character of the controverted question" is plain enough. The controversy involves a quarrel between carriers and customer, wherein the customer condemns as unlawful the yardage charge, for many years levied by the carriers in addition to the line-haul charge. Armour claims that the yardage charge is imposed upon a mere incidental terminal service, compensation for which is already included in the line-haul rate. The carriers insist that the charge is levied on a non-transportation or special yard service, or on a carrier service, compensation for which is not properly included in the line-haul rate. And history indicates that it is peculiar to the yards in question, a charge growing out of the practice of the car-

riers and the Yards Company by which the yards were made the common depot for the delivery of livestock consigned to Union Stock Yards, Illinois. See f.n. 2 and 3.

To solve this controversy it is necessary to determine what in actuality the service is that is being rendered, whether it is one which the rail carriers are bound to furnish, and whether it is already included in the line-haul rate. The inquiry necessarily compels recourse to certain facts, such as the history of the Chicago stockyards; the use of these yards as the carriers' usual place of delivery; the history of the yardage charge; the tri-party relation; and many other intricate facts of transportation incidental to rate-making.

Counsel for Armour finds comfort in the proposition that delivery at the place of destination includes a "mere way out to the public highways." The complaint alleges that no special yard services were requested, so he infers that whatever service is covered by the yardage charge is included in transportation. Then he concludes that as a matter of law the charge is included within the line-haul rate. We are not inclined to disagree with his proposition of law, but we fail to appreciate his inference and conclusion. As shown in the paragraph above, we are concerned here with questions that compel inquiry into the history, usages and actual conditions of operation at the stockyards. Our conclusion is that this case presents a controversy whose solution necessitates the exercise of administrative discretion, and therefore prior administrative resort is imperative.

That this case raises administrative problems, finds adequate support in such cases as *Adams* v. *Mills*, 286 U. S. 397; *Atchison, T. & S. F. R. Co.* v. *U. S.*, 295 U. S. 193; *St. Louis I. M. & S. R. Co.* v. *J. F. Hasty & Sons*, 255 U. S. 252; *I. C. C.* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, and *Aron* v. *Pennsylvania R. Co.*, 80 F. (2d) 100, cert. den. 298 U. S. 658. In the *Atchison Ry.* case, 295 U. S. 193, 195, 199, the Supreme Court described the collection of the yardage charge as a "long existing practice," and stated the case to be whether "the practice of the carriers and Yards Company in making the stockyards their depot for delivery of livestock pursuant to an arrangement by which the Yards Company imposes a yardage charge is an unjust and unreasonable practice." Further discussion will add little to what has already been said.

Stay Pending Administrative Determination. In a supplemental brief Armour also argues that if an administrative question was involved, the Trial Court should have suspended its consideration of the case, until after it had referred the question to the proper administrative bodies and they had properly passed upon it. Counsel relies on a recent opinion by the Supreme Court, where it was stated that "When it appeared in the course of litigation that an administrative problem * * * was involved, the court should have stayed its hand * * *. There should not be a dismissal, but * * * the cause should be held pending the conclusion of an appropriate administrative proceeding." *General American Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422.

In the *El Dorado Terminal* case, *supra*, the Supreme Court points for precedence to *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247. In the *Mitchell* case the primary jurisdiction point was not raised until some time after trial had started. The Court there said, p. 266, "But owing to the peculiar facts of this case, the unsettled state of the law at the time the suit was brought and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claims to the Commission * * * direction is given that the dismissal be stayed.". In the *El Dorado Terminal* case the primary jurisdiction point was not raised until after the trial on the merits.

In the instant case the primary jurisdiction point was urged *in limine*. Therefore, the reasons for staying the dismissal do not exist, and it cannot be said on the strength of the *El Dorado Terminal* case that the Trial Court erred in failing to hold this case pending administrative reference and adjudication. We conclude, therefore, that the circumstances here do not require an application of the stay rule as announced recently in the *El Dorado Terminal* case.

In the supplemental brief counsel for Armour also argues that the administrative finding in the *Hygrade* case, 195 I. C. C. 553, is a substitute for the prior administrative adjudication which we conclude is necessary in this case, and hence direct recourse may be had to the courts without again referring the same question to the Commission. It is true that the *Hygrade* case involved the same problem, and that ordinarily this argument would be cogent.

Unfortunately, we cannot entertain the argument advanced, for it is history that the *Hygrade* finding was reversed. ~~*for lack of supporting evidence.*~~ *Atchison Ry.* Case, 295 U. S. 193. See also *Union Stock Yard & Transit Co.* v. *U. S.*, 308 U. S. 213, for a restatement of the *Hygrade* decision.

Our conclusion that the primary jurisdiction doctrine of the *Abilene* case is applicable here, makes it unnecessary to rule on other matters raised on the appeal. See f.n. 1. The order of the District Court is affirmed. It is so ordered.

Endorsed: Filed April 4, 1940. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fourth day of April, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, April 4, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Armour and Company, *Plaintiff-appellant,*		Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
7030 *vs.*		
The Alton Railroad Company, *et al.,* *Defendants-appellees.*		

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

And afterwards, to-wit: On the nineteenth day of April, 1940, there was filed in the office of the Clerk of this Court a Petition of plaintiff-appellant for rehearing and motion for order remanding the cause to the lower Court for trial, and for a supplemental opinion, which said petition and motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Armour and Company, a Corporation, *Plaintiff-Appellant,* *vs.* The Alton Railroad Company, a Corporation, *et al.*, *Defendants-Appellees.*	On Appeal from the Order of Judge Holly, Entered in the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND MOTION FOR ORDER REMANDING THE CAUSE TO THE LOWER COURT FOR TRIAL, AND FOR A SUPPLEMENTAL OPINION.

To the Honorable United States Circuit Court of Appeals for the Seventh Circuit, and to the Honorable Judges thereof:

Now comes the plaintiff-appellant, and respectfully petitions this Court for rehearing, and respectfully moves

(a) for an order remanding this cause to the lower Court for trial on the merits;

(b) for an order setting aside the order of this Court, affirming the decision of the lower court;

(c) for the issuance of a supplemental opinion passing upon the two grounds of appeal not considered by the Court in its opinion, and correcting and clarifying its opinion in one respect wherein it appears to contradict, or deny, at least by inference, facts alleged in the complaint; which facts are, on motion to dismiss, deemed admitted and true, and binding on the Court for the purposes of such motion.

In support of said motion, plaintiff respectfully shows:

1. That in the Court's prior opinion herein, it found

to be inherent in the cause presented, an administrative question, requiring prior consideration by the Interstate Commerce Commission. Since the said decision of this Court, the Interstate Commerce Commission has fully considered and decided, the very administrative question referred to by the Court. Such decision is attached hereto as an Appendix. As a result, the lower court may now hear the case on the merits, and decide the same, in the light of such administrative disposition.

2. Remand to the lower Court for such disposition cannot yet be had, due to the fact that the lower Court's decision was based, not solely upon the existence of the undecided administrative question referred to, but upon two additional procedural defects, viz.:

(1) Defect of parties defendant, arising from plaintiff's failure to join the Yards Company as defendant; and

(2) Lack of jurisdiction of the lower Court over certain of the trustee defendants, due to plaintiff's failure to secure leave of the appointing Court, to the maintenance of the suit.

3. The opinion of the Court does not reflect the facts alleged in the complaint, in that it fails to state that on May 16th, 1933, Armour instructed each of said defendants, in effect, not to deliver its inbound livestock shipments to the Stock Yards Company (the public stock yards), unless the defendants were willing to assume all added expense arising from such delivery, and notifying defendants that it would accept delivery at any other point selected by said defendants. Under the Commission's decision, the election of the shipper to use the Yards Company's facilities, is made a condition precedent to the existence of the very administrative question found to exist by this Court.

The Court seems to assume the contrary of these facts, and that Armour made some conscious election of the yards of that Company as its delivering point; or acquiesced in such use of the property of that Company. Yet the Court found (Footnote a, page 3), that the complaint alleged that Armour used no facilities of the Yards Company, except as a transportation facility. It considered the reply of the Yards Company to Armour, of date May 10th, 1933, but apparently overlooked Armour's counter-reply of date May 16th, 1933, and Armour's notice to the carriers, of the same date (Exhibits E and F to complaint, Transcript of Record pages 36-38), wherein Ar-

mour went as far as it legally could go, in preventing any use of the property or service of the Stock Yards Company.

We respectfully suggest that the opinion be clarified in this respect.

Dated at Chicago, Illinois, April 19th, 1940.

Respectfully submitted,
Chas. J. Faulkner, Jr.,
Walter C. Kirk,
Paul E. Blanchard,
Attorneys for Plaintiff-Appellant.

Endorsed: Filed April 19, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-first day of May, 1940, the following proceedings were had and entered of record, to-wit:

Tuesday, May 21, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

7030	Armour and Company, *Plaintiff-appellant,* *vs.* The Alton Railroad Company, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the opinion of this Court filed in this cause on April 4, 1940, be, and it is hereby amended by making the following changes: On page 2, lines 16 and 17, the word "only" is changed to "usual", and the words "could ordinarily be" are changed to "was"; on page 2, line 19, the word "ordinarily" is inserted between the words "and delivery was" and the words "made there"; on page 4, in the 22nd line from the bottom of the footnotes, the words "for lack of supporting evidence" are deleted; on page 6, in the 6th line from the bottom, the words "which involve issues of law and those"

are inserted between the word "controversies" and the words "which involve"; and on page 9, in the 9th line from the bottom, the words "for lack of supporting evidence" are deleted.

And on the same day, to-wit: On the twenty-first day of May, 1940, the following further proceedings were had and entered of record, to-wit:

Tuesday, May 21, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Walter E. Treanor, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Armour and Company, *Plaintiff-appellant,* vs. The Alton Railroad Company, *et al.,* *Defendants-appellees,*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

7030

It is ordered by the Court that leave be granted to plaintiff-appellant to file an additional memorandum instanter.

It is further ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby denied.

It is further ordered by the Court that the motion of plaintiff-appellant for an order remanding the cause to the lower Court for trial, and for a supplemental opinion be, and the same is hereby denied.

And on the same day, to-wit: On the twenty-first day of May, 1940, there was filed in the office of the Clerk of this Court an opinion on Petition for Rehearing, which said opinion is in words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7030. OCTOBER TERM, 1939, APRIL SESSION, 1940.

ARMOUR AND COMPANY, a Corporation, *Plaintiff-Appellant*, *vs.* THE ALTON RAILROAD COMPANY, a Corporation, *Defendants-Appellees.* } Appeal from the Order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

May 21, 1940.

PETITION FOR REHEARING.

Before SPARKS, TREANOR and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* Armour's complaint and argument too was based on the theory that the particular yardage charge (imposed by the defendant railroads through their agent Yards Company) is levied on the bare privilege of removing the livestock from the unloading pens, a service already compensated for in the line-haul rate. The complaint and attached exhibits indicated that the livestock was consigned for delivery at Union Stock Yards, Illinois. Livestock consigned to this station is delivered by the defendant railroads at their common livestock depot (the public stock yards of the Yards Company) unless the consignee specifies delivery on industry tracks serving his plant or on team tracks of the individual railroads.

This court concluded that the District Court did not err in dismissing the complaint in question: it raised administrative problems and hence was subject to the primary jurisdiction of the administrative bodies. Since our decision the Interstate Commerce Commission has adjudi-

cated the administrative problems against Armour, *i. e.*, it has found that the transportation of livestock consigned for delivery at this common livestock depot ends at the unloading pens and that hence the carriers' failure to afford free egress is not an unreasonable practice.

In the course of the administrative opinion the Commission defined three possible factual situations involving the shipment of livestock. (1) Chicago shippers may consign livestock to themselves at the Union Stock Yards station, and if delivery is not requested as in (2) below, then delivery is at the public yards of the Yards Company. As to this situation the administrative finding is as stated in the preceding paragraph. (2) Chicago shippers may consign livestock to themselves at the Union Stock Yards station and specify delivery at team tracks or at industry tracks. As to team track delivery the consignee does his own unloading. As to industry track delivery he pays an additional switching charge. (3) Shippers may consign livestock to a station other than a public stock yard. As to this situation transportation does not end at the unloading pens and includes free egress therefrom to the public streets.

In this petition Armour contends that its case falls either in situation (2) or situation (3) and therefore our decision should be reversed. There is no merit in this contention. The complaint and exhibits are plain that Armour's case falls within the confines of situation (1) and the adverse administrative adjudication, unless disturbed in proper course, stands in Armour's way. In fact, to give heed to the contention here is tantamount to our giving Armour permission to alter or modify the true character of the complaint. This we can not do.

Plaintiff has asked leave to file an additional memorandum. Leave is granted. The memorandum has been considered. The petition for rehearing is denied.

In view of the position we have taken, there is also denied the motion for an order remanding the cause to the lower court for trial and the motion for a supplemental opinion. It is so ordered.

Endorsed: Filed May 21, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-fourth day of May, 1940, there was filed in the office of the Clerk of this Court, a Motion for stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7030.

Armour and Company, a corporation,
Plaintiff-Appellant,
vs.
The Alton Railroad Company, a corporation, *et al.*,
Defendants-Appellees.

On Appeal from the Order of Judge Holly, Entered in the District Court of the United States for the Northern District of Illinois, Eastern Division.

MOTION FOR STAY.

To the Honorable United States Circuit Court of Appeals for the Seventh Circuit, and to the Honorable Judges thereof:

Now comes the Plaintiff-Appellant herein, and respectfully moves for order of this Court, staying its mandate herein for a period of thirty days, in order to afford to Plaintiff-Appellant opportunity to prepare and file in the Supreme Court of the United States its petition, praying for review of the decision of this Court on writ of certiorari.

Dated at Chicago, Illinois, May 24th, 1940.

Chas. J. Faulkner, Jr., (sgd)
Walter C. Kirk, (sgd)
Paul E. Blanchard. (sgd)

Endorsed: Filed May 24, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-fifth day of May, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, May 25, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Armour and Company, *Plaintiff-appellant,* 7030 *vs.* The Alton Railroad Company, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the mandate of this Court in this cause be, and the same is hereby stayed pursuant to Rule 25 of the Rules of this Court.

And afterwards, to-wit: On the thirteenth day of June, 1940, there was filed in the office of the Clerk of this Court, a motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030.

Armour & Company, a corporation, *Appellant,* vs. The Alton Railroad Company, a corporation, *et al.*, *Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable William H. Holly, Judge Presiding.

MOTION FOR FURTHER STAY OF MANDATE.

Now comes Plaintiff-Appellant and respectfully moves for order of this Court (under the provisions of Rule 25 of this Court), further staying the mandate of this Court to and including July 15th, 1940, for the purpose of permitting Plaintiff-Appellant additional time within which to prepare and file its petition to the Supreme Court of the United States for review of the decision of this Court on writ of certiorari.

In support of its motion Plaintiff-Appellant shows that the counsel who briefed and argued this case in this Court, and in the lower State and Federal Courts, must engage in the trial of other causes before another tribunal, viz., the Interstate Commerce Commission, beginning June 17th at Washington, D. C., and June 24th at Louisville, Kentucky, which causes necessitate his departure from the city on June 14th, and his absence therefrom until on or about July 1st, 1940. That the magnitude of said proceedings is so great, and the parties involved therein so numerous, that a postponement thereof probably cannot be obtained, so that Plaintiff-Appellant has no other counsel sufficiently familiar with the facts and issues in this case, or with the facts and issues in the causes to be tried, to permit sub-

stitution of counsel in either proceeding without great risk to its rights involved in said cases.

Dated at Chicago, Illinois, this 13th day of June, 1940.

Chas. J. Faulkner, Jr.,
Walter C. Kirk,
Paul E. Blanchard,
Attorneys for Plaintiff-Appellant.

Service of the foregoing Motion for further stay of mandate is hereby accepted this 13th day of June, 1940, and the undersigned consents to the extension requested in said motion.

Sidley, McPherson, Austin & Burgess,
By D. Robert Thomas, Jr.

Hay, Morton & Freytag,
By Meyer Morton,
Frank H. Towner,
Bryce L. Hamilton.

Endorsed: Filed June 13, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fourteenth day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, June 14, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

7030	Armour and Company, *Plaintiff-Appellant,* *vs.* The Alton Railroad Company, *et al.,* *Defendants-Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is now here ordered that the issuance of the mandate of this Court be further stayed to and including July 15, 1940.

And afterwards, to-wit: On the eleventh day of July, 1940, there was filed in the office of the Clerk of this Court, a motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7030.

Armour & Company, a corporation, *Appellant*,
vs.
The Alton Railroad Company, a corporation, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable William H. Holly, Judge Presiding.

MOTION FOR FURTHER STAY OF MANDATE.

Now comes Plaintiff-Appellant and respectfully moves for order of this Court (under the provisions of Rule 25 of this Court), further staying the mandate of this Court to and including August 1st, 1940, for the purpose of permitting Plaintiff-Appellant additional time within which to prepare and file its petition to the Supreme Court of the United States for review of the decision of this Court on writ of certiorari.

Dated at Chicago, Illinois, this 11th day of July, 1940.

Chas. J. Faulkner, Jr.,
Walter C. Kirk,
Paul E. Blanchard,
Attorneys for Plaintiff-Appellant.

Service of the foregoing Motion for further stay of mandate is hereby accepted this 11th day of July, 1940, and the undersigned consents to the extension requested in said motion.

Sidney, McPherson, Austin & Burgess,
By Douglas F. Smith.
Hay, Morton & Freytag,
By Elmer W. Freytag,
Frank H. Towner,
Bryce L. Hamilton.

Endorsed: Filed July 11, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twelfth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, July 12, 1940.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

7030	Armour and Company, *Plaintiff-Appellant,* *vs.* The Alton Railroad Company, *et al.,* *Defendants-Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is now here ordered that the issuance of the mandate of this Court be further stayed to and including August 1, 1940, for the purposed of permitting appellant additional time in which to prepare and file its petition for a writ of certiorari in the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 67 to 98, inclusive, contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, motion, and stipulation and orders relative to briefs, brief on petition for hearing, answer thereto and memorandum to answer) in the case of:

Cause No. 7030.

Armour and Company,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, *et. al.*,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 29th day of July, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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[fol. 100] INTERSTATE COMMERCE COMMISSION

No. 27862

SWIFT & COMPANY, et al.

v.

ALTON RAILROAD COMPANY, et al.

Submitted June 21, 1939. Decided April 8, 1940

1. Transportation of direct shipments of livestock consigned to complainant at the Union Stock Yards, Chicago, Ill., found to be completed when the livestock is placed in the unloading pens at the Union Stock Yards. Yardage charges assessed by the Union Stock Yards & Transit Company of Chicago on direct shipments of livestock transported to the Union Stock Yards for services performed and facilities used beyond the gates leading from the pens in the stock yards into which the livestock is unloaded from railroad cars, found not subject to the jurisdiction of the Commission.

2. Defendants' failure to afford egress for direct shipments of livestock transported to the Union Stock Yards found not to have resulted or to result in an unreasonable practice.

3. Complaint dismissed.

R. D. Rynder for complainants.
Paul E. Blanchard for intervener.
H. R. Park for interested party.
Douglas F. Smith, Kenneth F. Burgess, and Robert Thomas for defendants.

REPORT OF THE COMMISSION

SPLAWN, Commissioner:

Exceptions were filed to the examiner's report by complainant; defendants replied; and the parties were heard in argument.

Complainants are Swift and Company, and G. H. Hammond Company and Omaha Packing Company, wholly

owned subsidiaries of Swift & Company. They, with the exception of G. H. Hammond Company, are engaged in the packing-house business and operate packing plants for the processing of livestock at Chicago, Ill. G. H. Hammond Company formerly operated a packing plant, but since the complaint was filed operation of the plant has ceased. Complainants' plants are located adjacent to the Union Stock Yards in Chicago, owned and operated by The Union Stock Yard and Transit Company of Chicago, hereinafter referred to as the Yard Company. The defendants are common carriers by railroad engaged in the transportation of livestock to Chicago. The Yard Company is not named a defendant. [fol. 101] Although livestock consigned to G. H. Hammond Company and Omaha Packing Company at the Union Stock Yards has arrived at those yards in the past, the volume of shipments so consigned has been small. The bulk of the traffic about which complaint is made has been consigned to Swift & Company. For convenience, Swift & Company will be referred to as if it were the only complainant.

It is alleged, in substance, by complaint filed September 20, 1937, that defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards to the nearest public street, in connection with direct shipments of livestock consigned to complainant, free from any charge other than the line-haul rate, has resulted and results in an unreasonable practice. We are asked to require defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock Yards to the public streets free from the payment of any charges other than the line-haul rate. We are also asked to award reparation to each complainant for charges paid by reason of the alleged unlawful practice during the period of 2 years preceding the filing of the complaint and during the pendency of this proceeding.

Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief. The proceeding in the State court was subsequently removed to the United States District Court for the Northern District of Illinois, Eastern Division, and motions by defendants to dismiss were sustained May 31, 1939.

The situation complained of may be described as follows. A carload of livestock is shipped from a point in Iowa, consigned to Swift & Company at the Union Stock Yards in Chicago. This is known as a direct shipment, as distinguished from a shipment consigned to a commission merchant at the stockyards for sale. Under the provisions of section 15 (5) of the Interstate Commerce Act, the transportation includes delivery of the livestock into suitable pens at the stockyards at the line-haul rate without extra charge to the shipper or consignee. The livestock is transported by defendants to unloading platforms on the property of the Yard Company. Upon arrival of the car at the unloading platform, the car door is opened by employees of the Yard Company and the livestock is driven by employees of the same company through chutes into unloading pens adjacent to the unloading platforms. The unloading platforms, chutes, and pens are owned by the Yard Company. If employees of Swift & Company are at [fol. 102] the unloading pens when the animals are placed therein, the animals are driven by Swift & Company's employees from the unloading pens through the property of the Yard Company to Swift & Company's plant located outside of the stockyards. If employees of complainant are not at the unloading pens when the animals are placed therein, and if the volume of livestock arriving at the unloading pens is sufficient to necessitate immediate removal of the animals from the loading pens to holding pens located throughout the yards, the animals are driven from the unloading pens to holding pens in the stockyards by employees of the Yard Company, and are later driven from the holding pens through the Yard Company's property to Swift & Company's plant by employees of the latter company. Irrespective of whether possession of the animals is taken at the unloading pens or at the holding pens by Swift & Company's employees, Swift & Company is required to pay a yardage charge on each animal. This yardage charge is assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture.

Complainant's claim is that delivery of the livestock into suitable pens at the stockyards includes delivery to it in such manner as to permit the animals to be removed by its employees from the unloading pens to the nearest public street without the payment of a yardage charge. It seeks

to be relieved of the payment of the yardage charge on shipments of livestock consigned to it at the Union Stock Yards.

A complaint containing issues substantially similar was considered by the Supreme Court in Atchison T. & S. F. Ry. Co. v. United States, 295 U. S. 193, in which our order in Hygrade Food Products Corp v. Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553, was set aside. Complainant contends that it is presenting a case different from that considered and decided in the above proceedings.

The Union Stock Yards, owned and operated by the Yard Company, is located in Chicago and is the terminal at which the preponderant amount of the livestock transported by rail to Chicago is received. It is the largest livestock market in the United States and is the only public market for the sale of livestock in Chicago. Immediately west of the Union Stock Yards is an area commonly known as Packingtown. The plants of Swift & Company and other packers are located in this area. It is physically impossible to remove livestock from the unloading pens in the stockyards to complainant's plant or to public streets except by use of the Yard Company's property. The Yard Company, with respect to part of its business, is a common carrier of freight [fol. 103] by hire, is engaged in interstate commerce, and is subject to the Interstate Commerce Act.[1] It is also a stock yard owner as that term is defined in the Packers and Stockyards Act.[2] As such, it is engaged in operating a public stockyard. In the operation of its business as a stockyard owner, it is subject to the jurisdiction of and regulation by the Secretary of Agriculture.

The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable on all livestock received at the Union Stock Yards. These charges are 45 cents per head on cattle, 35 cents on

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[1] United States v. Union Stock Yard & Transit Co., 226 U. S. 286; Livestock Loading and Unloading Charges, 52 I. C. C. 209; Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330; Cancelation of Livestock Services at Chicago, 227 I. C. C. 716; Union Stock Yard & Transit Co. v. United States, 308 U. S. 213.

[2] Sections 201 to 229 of the Packers and Stockyards Act, Title 7, U. S. C. A.

calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and are assessed and collected by the Yard Company on every animal unloaded from railroad cars at the stockyards.

With respect to direct shipments, these charges are compensation for services performed by the Yard Company after the stock is placed in unloading pens and for the use of its facilities, such as holding pens, alleys, and ways in the stockyards. With respect to shipments consigned to commission men, the yardage charges cover, in addition to the services on direct shipments, use of the Yard Company's facilities pending the sale of the livestock, and the use of facilities for removal of the stock from the yards after it is sold.

The tracks of the line-haul carriers do not reach the stockyards, which are served exclusively by tracks owned by the Yard Company and leased by it to The Chicago River and Indiana Railroad Company. By authority of trackage rights and the use of their own crews and power, all livestock consigned for delivery at the stockyards is placed by the trunk lines on the tracks adjacent to the unloading platforms. When the livestock reaches the unloading platforms, no one is permitted by the Yard Company to handle the animals except employees of that company. This is necessary for the efficient and orderly handling of the large number of shipments arriving at the yards.

The bulk of the movement is received at the yards during the first days of the week, and approximately three-fourths of the daily movement is unloaded between 3 and 8 a. m. In some instances, immediate removal of the animals from the unloading pens is necessary to preserve an even flow of livestock from the cars into the yards.

During the more than 70 years of its existence the Union Stock Yards has been the principal terminal at which live- [fol. 104] stock consigned to Chicago has been received. Since the beginning of its operations, the Yard Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises, irrespective of whether the shipments were direct shipments to a packer or whether they were consigned to a commission merchant for sale. Prior to 1927 the number of direct shipments received at the Union Stock Yards by complainant was relatively small. About that time, various conditions combined to make it necessary for the packers, including complainant, to purchase livestock in greater quantities at country points,

and to have such shipments consigned to them at Chicago. By 1929 the number of direct shipments to complainant at the stockyards grew to a substantial amount. This condition continued for several years until complainant began to consign its direct shipments to the plant of its subsidiary, Omaha Packing Company, located approximately 2 miles from the Union Stock Yards. Thereafter the number of direct shipments consigned to complainant at the stockyards decreased. During the first 4 months of 1938, 18 cars of direct shipments were received by complainant at the Union Stock Yards. At the hearing herein it was stated that practically all of complainant's direct shipments are being made to the plant of the Omaha Packing Company and that no such shipments are being received at the Union Stock Yards. By having its shipments consigned to the plant of the Omaha Packing Company, complainant is relieved of the payment of the yardage charge. The stock received at the plant of the Omaha Packing Company is transported by motortruck over the streets in Chicago to complainant's plant.

In May 1933 complainant advised the traffic officers of defendants and the Yard Company that it was prepared to accept direct shipments of livestock at the reasonable and proper pens of each defendant at the Union Stock Yards, and to remove the livestock to its own plants within a reasonable time without other use of the Yard Company's facilities; and that on and after May 25, 1933, it would refuse to pay any yardage charges on direct shipments consigned to it at the Union Stock Yards. The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company would not permit livestock consigned to complainant to be delivered to it or its employees. Complainant then notified defendants that on and after May 25, 1933, the Yard Company had no authority to accept or receive livestock for complainant's account; that any delivery by defendants of complainant's livestock to the Yard Company for unloading and delivery, except as defendants' agent, would constitute a conversion of complainant's [fol. 105] property; and that payment of yardage charges to the Yard Company made to gain possession of its property would be made by complainant under protest.

As a result of subsequent correspondence between complainant and the Yard Company, the Yard Company agreed to accept payment of the yardage charges with the understanding that such payments would be made under protest. It was also agreed that it would be understood that, with respect to each direct shipment made thereafter, complainant had made a physical demand for delivery and the right to promptly remove the stock from the premises of the Yard Company without the payment of yardage charges, and that the demand had been refused by the Yard Company. Each of the defendants refused complainant's demands. Later, in September 1935, the demands were repeated in letters sent to the defendants and were again refused.

Since May 25, 1933, in each instance in which complainant has paid yardage charges on direct shipments it has done so under protest. At stated intervals since the above date, it has rendered bills against each defendant for the amount of yardage charges paid to the Yard Company under protest.

There is no dispute with respect to the character of service in the stockyards required on direct shipments. All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees. Complainant does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.

Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge. Several suggestions as to means of egress were made. It was emphasized, however, that complainant is not demanding egress at any particular points but simply egress to a public street or highway via the shortest or most convenient way, to be designated by defendants. Because of the physical situation at

[fol. 106] the Union Stock Yards, defendants could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company.

As hereinbefore stated, since the establishment of the stockyards more than 70 years ago, the Yard Company has collected a yardage charge on every animal unloaded from a railroad car at the Union Stock Yards, regardless of whether the stock was consigned to a packer for immediate slaughter or to a commission merchant for sale. This custom and practice not only has prevailed at Chicago but was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice. During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company. These facts are shown in copies of the following documents which were received in evidence: Agreement dated January 15, 1892, between the Chicago Junction Railway and Union Stock Yards Company of New Jersey, a holding company which owned practically all the stock of the Yard Company, and Philip D. Armour and others, Nelson Morris and other, and Gustavus F. Swift and others; a similar agreement of the same date, between the New Jersey Company and certain smaller packers; complaints filed in 1891 by Swift & Company, Armour & Company, and other packers against the Yard Company in the circuit court of Cook County, Ill.; answers to said complaints filed by the Yard Company; stipulations dismissing the above complaints; and extracts from a report of the Federal Trade Commission on the meat-packing industry, dated June 28, 1919.

Complainant objected to the receipt in evidence of the above-described documents. Pursuant to complainant's request, a further hearing was held to afford it an opportunity to introduce evidence relating to the documents. At the further hearing evidence bearing on certain matters embraced in the documents was introduced on behalf of complainant. At the conclusion of the further hearing before the examiner, complainant's counsel moved that the documents and the evidence bearing thereon be stricken from the record. The motion is overruled.

Since 1865, when the Yard Company began operations, there has been a line of demarcation between the services

which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the [fol. 107] yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers. The practices described had been in effect for practically 25 years, when certain transactions described in the documents referred to were entered into by the Yard Company and certain packers, including complainant and intervener, under which the packers received participation in the profits from the Yard Company's operations.

The evidence shows that at some time prior to 1890 the packers had threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. This was a matter of concern to the Yard Company because its revenue was received in large measure from the charges collected on livestock slaughtered by the packers. The packers had acquired a large tract of land in Indiana to be used as a new site for their plants. They had also purchased property known as the "Central Stock Yards," near the property of the Yard Company, and had erected on these premises platforms, pens, sheds, and sidings "for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago or directly consigned to them, and thereby avoiding the payment of yardage charges" to the Yard Company. They had also demanded, in complaints filed in Illinois, that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the Central Stock Yards.

The steps taken by the packers to relieve themselves of the payment of yardage charges resulted in the execution of the contract of January 15, 1892. By the terms of this contract, the packers agreed to convey to the New Jersey Company, owner of the Yard Company, the Indiana site and the Central Stock Yards; to dismiss the suits filed in the Illinois court, and to refrain from filing similar suits during the

life of the agreement, which was for 15 years; to continue their business at Packingtown for 15 years from July 1, 1891; "to guarantee that any and all live stock slaughtered by them on their premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, and to pay the usual yardage charge therefor;" to guarantee that the Yard Company "shall receive and collect from its yardage charges on cattle and livestock owned or purchased by or conveyed to said parties of the second part (the packers) and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years," and to make up any deficiency in that amount. The packers also agreed that as long as the Yard Company conducted its busi- [fol. 108] ness at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.

The consideration for the above covenants by the packers was the receipt by them of income bonds of the New Jersey Company in the amount of $3,000,000. Complainant received approximately one-third of these bonds which were subsequently redeemed by the New Jersey Company.

It appears that during the existence of the agreement described, the packers, including complainant, agreed to pay the yardage charges, participated in the receipts of the Yard Company from said charges, and considered the assessment of such charges on their shipments a matter between themselves and the Yard Company. The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned.

The agreement of 1892 expired in 1907, except for the covenant by the packers not to use any other stockyards for the receipt of their livestock so long as the Yard Company maintained its business in Chicago. The report of the Federal Trade Commission shows, however, that stockholders of the New Jersey Company were informed that the packers were still threatening to move their plants from Chicago and that some arrangement must be made to hold them.

It is shown that complainant expected to receive a share of the Yard Company's earnings as late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. The report definitely shows, however, that J. O. Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.

The important fact is that, after the agreement of 1892 expired, the packers continued to pay the yardage charge, made no complaint to the railroads against its assessment, and for several years attempted to share in, and one of them actually did share in, the revenues received by the Yard Company. In an appearance before a Congressional committee in 1919, L. F. Swift, an official of complainant, testified as follows:

[fol. 109] I know that we wanted this arrangement (under the 1892 contract) to continue. * * * He (Prince) told me if I would keep still and not press the matter—not move our plant or threaten to move it, keep still, I might get something after a while.

The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning abou 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Com-

pany and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.

The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services. The Yard Company furnishes the services and facilities for which the yardage charges are assessed. Prior to 1921 it fixed the measure of the charges, and since that date it has performed the same function under the supervision of the Secretary of Agriculture.

For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago.

[fol. 110] Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant,

may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there.

An analysis of the billing of 3,061 cars, comprising direct shipments of livestock to complainant, unloaded at the Union Stock Yards from January 1935 to March 1938, both inclusive, shows that 84.4 per cent were consigned by representatives of complainant to the Union Stock Yards, and that the remaining 15.6 per cent were delivered to the stockyards, although delivery at that point was not specified in the livestock contract. Under the terms of the contract, complainant could have required delivery of the 15.6 per cent of shipments either at the stockyards or on defendants' team tracks, but complainant never requested delivery of those shipments to any point other than the Union Stock Yards.

The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge.

Issues substantially similar to those here presented have been considered and decided in Hygrade Food Products [fol. 111] Corp. v. Atchison, T. & S. F. Ry. Co., supra, and Atchison, T. & S. F. Ry. Co. v. United States, supra. In the complaint in the above proceeding filed against both the line-haul carriers and the Yard Company, it was alleged that the practice of the line-haul carriers and the Yard Company in making the stockyards their terminal for delivery of livestock, pursuant to an arrangement by which the Yard Company imposed a yardage charge, was an unjust and unreasonable practice. We found that livestock consigned

to complainant at the stockyards was not subject to yardage charges in instances where delivery of stock was taken by complainant at the unloading pens. Upon appeal, the Supreme Court reversed our finding, and, in its opinion, stated:

> Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into *situ*able pens as is now required by section 15 (5). * * * The statute cited clearly discloses the intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

It is to be noted that the Supreme Court stated that, in respect of the particular shipments involved, transportation ended at the unloading pens.

The Court also found that section 15 (5) of the Interstate Commerce Act "left undisturbed the Yard Company's practice of making a charge for livestock received," and that the Packers and Stockyards Act, enacted about a year later, defined the practice of the assessment of yardage charges as a stockyard's practice, and subjected the services for which the charges were made to the jurisdiction of the Secretary of Agriculture.

Complainant here contends that the issue in this proceeding differs from that decided in the Hygrade case; that the complainant in the Hygrade case was using runways, alleys, an overhead viaduct, and a tunnel belonging to the Yard Company; and that it was, in effect, demanding that the carriers provide a delivery beyond their own terminals into the Hygrade plant, whereas complainant here is demanding only egress from the unloading pens to the nearest public street. The alleged difference is not one of substance, because the evidence in this proceeding shows that alleys, ways, and, in some instances, overhead viaducts belonging to the Yard Company must be used to remove animals from the unloading pens to the public streets. In the Hygrade case it was shown that possession of a substantial portion of complainant's shipments was taken by complainant at the unloading pens, and the Supreme Court stated that, with respect to such shipments, transportation ended at the unloading pens.

[fol. 112] Reference is made by complainant to certain language [3] of the Court as a clear intimation that the consignee of the livestock was and is entitled to a mere egress and a mere way out of the stockyards. Such an interpretation of the language referred to is inconsistent with the statement of the Court that "Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5)." In the statement referred to by complainant, the Court was contrasting the situation at public stockyards with the situation at livestock terminals other than public stockyards, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street. The evidence here conclusively shows that there is no essential difference between the routes and the services required from the unloading pens to plants outside the stockyards and a way out to the public highways. In either case, property of the yard company must be used.

Emphasis is placed by complainant on the provisions of the act which define "transportation" and to the inclusion in that term of the word "delivery," and it is contended that our jurisdiction is co-extensive with transportation as defined in section 1 (3) of the act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

The provision of the act which differentiates between livestock and other carload freight with respect to the un-

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[3] "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yard Company's properties for this service from mere egress such as is included in the transportation of live stock to destinations other than public stockyards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

loading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section. The material portion of the amendment is as follows:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request [fol. 113] of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

There is nothing in the amendment which imposes an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable pens to the boundary of the Yard Company's property. It would appear that had such been the intention of Congress, the words "delivery at public stockyards of inbound shipments into suitable pens" would have read "into suitable pens and from those pens to the boundary of the stockyards." The amendment indicates an intention by Congress to constitute the pens as the point where the duties of the defendants terminate. The word "suitable" is descriptive of the character of the pens into which the stock must be unloaded and does not, under a reasonable interpretation of the language used, refer to the character of egress from the pens to the boundary of the yards.

Complainant takes the position that there is nothing in the language of section 15 (5) that narrows or restricts our jurisdiction; that the provision is remedial and is entitled to a liberal interpretation that fairly accomplishes its purpose; that under such an interpretation it would seem that a pen from which it is impossible for a consignee, who is on hand when his stock is unloaded, to take his shipments without extra charge cannot be a suitable pen; that there is nothing in the provision to indicate that Congress meant to take away the opportunity to obtain complete possession of the property at destination; and that the contention that our jurisdiction ends at the unloading pens comprehends

the proposition that defendants' common-law duty has been reduced by section 15 (5).

The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in Adams v. Mills, 286 U. S. 397. For almost 50 years prior to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier,[4] it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its unloading charge [fol. 114] from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted.

The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of

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[4] United States v. Union Stock Yard & Transit Co., supra.

taking property at the point of origin and *delivering it to the point at which it is to leave the car.* (Emphasis supplied.)

Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

> It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *. (Emphasis supplied.)

Evidence of the intent of section 15 (5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge.

Additional evidence of the intent of section 15 (5) is to be found in the conduct of complainant and other packers since its enactment. When the amendment was proposed, the yardage charges had long been a matter of concern to the packers. They had sought to avoid the payment of the charges by threatening to move their plants and by acquiring the Central Stock Yards; they had sued the Yard Com- [fol. 115] pany to compel it to permit delivery of direct shipments over its rails at the Central Stock Yards; and, upon receiving an interest in the Yard Company's business under the contract of 1892, they gave up the Central Stock Yards and continued to pay yardage charges. For a number of years after expiration of the contract of 1892 they had sought to have the arrangement under which they participated in the Yard Company's profits renewed. The acquiescence by the packers in the assessment of the yardage charge is evidence that they did not believe that section 15

(5) could reasonably be given the meaning they now urge. The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. Southwestern Horse & Mule Assn. v. A., T. & S. F. Ry. Co., 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under section 15 (5) the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 percent of the voting stock. It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges were being assessed on direct shipments. The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to.

Direct shipments of livestock transported by rail to packers at Chicago have exceeded 30,000 carloads annually for several years, as compared with a total annual average rail movement to the Union Stockyards of 94,629 cars. The shift from producers' consignments to direct shipments is rapidly increasing. The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago.

Reference is made both by complainant and defendants to proceedings before us in which the question of yardage charges has been considered. An examination of the cases cited shows that in only two of them has the question here presented been determined.

The first case, after the enactment of section 15 (5), in which the question was raised was Southwestern Horse & Mule Assn. v. A., T. & S. F. Ry. Co., supra. There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards were beyond our jurisdic- [fol. 116] tion. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens.

The other case in which an issue similar to the issue herein was considered was Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., supra. There complainant's employees had taken possession of approximately 15 per cent of their direct shipments at the unloading pens of the Union Stock Yards in Chicago and had driven such shipments through the yards to its plant. In such instances, we found the assessment of yardage charges unlawful. As hereinbefore shown, the Supreme Court stated that, with respect to the shipments in question, transportation ended when the animals were placed in the unloading pens.

Since the decision of the Supreme Court in the Hygrade case, the Court and we have interpreted that decision as holding that transportation of direct shipments of livestock to a public stockyard terminates at the unloading pens. See Denver Union Stock Yard Co. v. United States, 304 U. S. 470; Livestock to or from Union Stock Yards, Chicago, 222 I. C. C. 765.

In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary pre-cribing the charges for this service at three public stockyards have been sustained in court proceedings. See St. Joseph Stock Yards Co. v. United States, 298 U. S. 38; Denver Union Stock Yards Co. v. United States, supra; Union Stock Yards Co. of Omaha v. United States, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary.

Defendants contend that we cannot enter an effective order in this complaint granting the relief sought, because the Yard Company is an indispensable party and is not named a defendant. It points out that the Yard Company is a common carrier subject to the act and is solely responsible for the practice complained of; that it levies, collects, and retains for itself the yardage charge; that it denies use of its property unless the yardage charges are paid to it; and that it alone can modify or permit the modification of the charges and practices complained of. In view of our findings herein, it is unnecessary to determine this question.

The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. [fol. 117] That does not mean delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.

The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15 (5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own.

In the Hygrade case the Supreme Court stated that, with respect to shipments of which the complainant took possession at the unloading pens, the transportation ended at the unloading pens. There is no difference in principle between the issue in the Hygrade case and the issue in this proceeding. The yardage charge is collected on complainant's shipments when it takes possession of the animals at the unloading pens, and in the Hygrade case it was collected on that portion of the shipments of which possession was taken at the unloading pens. With respect to such shipments, the Supreme Court stated that the obligation of the

line-haul carriers ceased when the animals were placed in the unloading pens.

We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this report, transported [fol. 118] to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

The complaint will be dismissed.

ALLDREDGE, Commissioner, dissenting:

In my judgment the report in this case misconstrues the opinion of the Supreme Court in Atchison, T. & S. F. Ry. Co. v. United States, 295 U. S. 193. Reliance is placed upon one statement contained therein to the effect that transportation of livestock designed to public stockyards ends upon the unloading of the stock into suitable pens. A correct construction of the opinion of the Court is, I believe, that the Court did not consider that the question of free egress from the stockyards was presented for decision, that the Court did not itself undertake to say that the transportation ended with delivery into unloading pens, and that it set aside the findings in Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., 195 I. C. C. 553, not because they were wrong in principle, but because they were technically inadequate.

Neither am I able to find anything in the Court's opinion revealing a purpose to set aside the principles enunciated in Covington Stock-Yards Co. v. Keith, 139 U. S. 128, relied upon by us in Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co., supra, and likewise specifically applicable to the facts and circumstances disclosed in the instant proceeding. It was there said (pages 135-136):

A carrier of livestock has no more right to make a special charge for merely receiving or merely delivering such stock,

in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

[fol. 119] Consistent with the principles set forth in the foregoing excerpt from the opinion of the Court I think we should here find that defendants' transportation obligations do not end with delivery of the stock into unloading pens, and that it is their duty under the law to afford through their agent, the stockyard company, access to the property of the latter for removal of their livestock therefrom, within a reasonable time after it has been placed in unloading pens, and without the payment of any special toll or charge, and that the transportation does not end until the obligations above set forth have been fulfilled.

Chairman Eastman and Commissioner Aitchison did not participate in the disposition of this case.

[fol. 120] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 179 to 198, inclusive, contain a true copy of a decision of the Interstate Commerce Commission decided April 8, 1940, in Number 27862, Swift & Company et al. v. Alton Railroad

Company, et al., as the same appears on pages 31 to 59 inclusive of the Petition of Plaintiff Appellant for Rehearing and Motion for order remanding the cause to the Lower Court for Trial, etc., filed in this Court on April 19, 1940, and which was not included in the record prepared by the Clerk of this Court for use in connection with a petition for a writ of certiorari in the case of Cause No. 7030, Armour & Company, a corporation, Plaintiff-Appellant, vs. The Alton Railroad Company, a corporation, et al., Defendants-Appellees, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of September, A. D. 1940.

Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal.)

[fol. 121] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUL 31 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

against

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHAS. J. FAULKNER, JR.,
JOHN POTTS BARNES,
WALTER C. KIRK,
PAUL E. BLANCHARD,
Attorneys for Petitioning Plaintiff.
Post Office Address,
Armour Building,
43rd St. and Racine Avenue,
Union Stock Yards,
Chicago, Illinois.

Chicago, Illinois, August 1st, 1940.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

against

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petition.

The petitioner, Armour and Company, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter styled the Circuit Court) entered in the above cause (on original appeal) on April 4, 1940, and (on petition for rehearing) on May 21, 1940.

The opinions of the courts below; the statutes involved;

and the specific errors complained of, are fully set forth in the brief contemporaneously filed in support of this petition.

Summary Statement of the Matter Involved.

This case involves the question of the original jurisdiction of the District Courts of the United States under Section 9 and 22, (and incidentally of the State Courts, under 22) of the Act to Regulate Commerce (Sec. 9 and 22, Title 49, U. S. C. A.), (hereinafter referred to as the Commerce Act), to hear and decide, without prior consideration of the question by the Commerce Commission, an action brought against a common carrier by railroad in interstate commerce, for damage arising from carriers' wrongful delivery of Plaintiff's property at destination, to a third person not entitled to receive it as Plaintiff's agent, and not a party to any transportation contract with the Plaintiff, before any tender of delivery thereof had been made to Plaintiff. Incidental to the consideration of this basic jurisdictional question, are related questions, involving the substantive Federal law of common carriers, hereafter referred to.

No evidential controversy is presented. The case is here solely on Defendant's motion to dismiss for lack of jurisdiction: The facts set forth in the complaint are, for the purposes of the motion, taken as admitted and true (*Kansas* v. *Colorado*, 185 U. S. 125), (*Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149, at 152, and cases there cited). (*Leimer* v. *State Mut. Life Assurance Co.*, 108 Fed. (2d) 302, at 305, and cases there cited.)

Those facts are summarized, with record references, as follows:

> Defendants are common carriers by railroad. (R. 5.) They hold themselves out to transport livestock to a station named in their tariffs as "Union Stock Yards,

Illinois" (R. 7), *at which station* (but *not* constituting it) they maintain a common depot (R. 7) at a public stock yard not owned by them. (R. 6.)

Plaintiff, after May 25, 1933, purchased many cars of livestock, and contracted with Defendants severally, for the transportation thereof, and for delivery to Plaintiff at the tariff station, "Union Stock Yards, Illinois" (R. 9) (*not* at the public stock yards). Plaintiff fully performed its contract (R. 9) but, before Defendants had tendered any delivery thereof to Plaintiff, or completed the transportation of such shipments, Defendants placed the shipments in the possession of the Stock Yards Company. (R. 9, 10.) After unloading them, before any attempt at direction or control by the Plaintiff, the Stock Yards Company notified the Plaintiff of the location of its property. (R. 10.)

Before any of the shipments had arrived at the destination station, or been placed in the possession of the public stock yards, Plaintiff had notified each Defendant, that it desired a delivery of such shipments through carriers' *own* pens, *either* at the public stock yards, "*or at such other point at which delivery was tendered,*"* but would, after May 25, 1933, pay no charges above the tariff transportation rate for mere delivery. (R. 11 and 32, 33.) The public yards then notified Plaintiff that it would levy an extra charge upon any of Plaintiff's property placed in the public stock yards by the carriers. (R. 11.)

Plaintiff passed this information on to the carriers, and notified them that the public stock yards had no authority, after May 25, 1933 (R. 12) to accept or receipt for, or handle, Plaintiff's livestock as its agent, or for its account (and that Plaintiff desired to use no service or facilities of the Yards Company such as had

* In this connection the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, should be noted. At page 136, this Court held that the carrier had the absolute right to select a point within the limits of the destination station, as the delivering point for livestock shipments; that it might even select and hire a public stock yards, and if such delivery were offered to consignee without the imposition of extra charges, consignee would have no cause of complaint. Accordingly, the Plaintiff here had no legal right to do more than name the tariff station at which delivery should be made; and this action is not for damages arising *per se* from Defendants' employment of the public stock yards as their delivering agent, but for damages arising from Defendants' failure to pay the agent they had hired.

been used by Plaintiff prior to May 25, 1933). (R. 10, 11.) Plaintiff repeated its notice that it would accept this livestock either at the public stock yards "or at any other point where tender thereof was made," and notified Defendants that any delivery of its property by Defendants to the Stock Yards Company, would constitute a conversion of its property (excepting a delivery for a free redelivery to Plaintiff). (R. 12, 36-38.)

Defendants well knew the foregoing facts, and knew that if they delivered Plaintiff's property to the Yards Company, Plaintiff would never receive it until Plaintiff had paid the extra charges demanded by such Yards Company. (R. 13.) Notwithstanding this knowledge Defendants failed:

(1) to provide, by lease or otherwise, any depot pens or facilities any place at their said station, either at the public stock yards or elsewhere, through or over which Plaintiff might receive a free delivery of its property. (R. 20.)

(2) to make any arrangement with carriers' agent, the Yards Company, under which Plaintiff might have free ingress to, and egress to a public street from, the point at which delivery of Plaintiff's property was first tendered to it. (R. 13, 14.)

As to each contract of shipment made after May 25, 1933, Defendants continued to place Plaintiff's property in the possession of the Stock Yards Company, before any tender of delivery to Plaintiff, but refused to pay the Stock Yards Company any of the charges demanded by it for the services and facilities rendered and furnished to the said carriers for such property. As a result no opportunity was ever afforded the Plaintiff, by the Defendants, to take possession of its property at any point at destination, without the payment to a third person, not a party to the transportation contract, and not the agent or employee of Plaintiff, and not a common carrier employed by Plaintiff, of a sum of money over and above the transportation rate, which sum Plaintiff had never contracted or agreed to pay, for a service which Plaintiff had never demanded or engaged. (R. 17.) Plaintiff paid the charges of carriers' employee under protest, for carriers' account, demanded repayment thereof from Defendants, and

upon their refusal to reimburse Plaintiff (R. 17), it brought this suit.

1. *The new factual situation and contractual status presented.*

The case thus presents a factual situation, and a contractual status as to deliveries of livestock at the Chicago Public Stock Yards, *differing from any prior case* considered by this Court involving deliveries at those yards, in this respect: Here, the consignee made *no selection* of any specific point within the limits of the destination station, at which delivery should be made, but left that selection to the carrier,* with the proviso that the carriers *should not* select the said public stock yards, located within those station limits, as the delivery point, *unless* they assumed the added costs resulting from such selection. In former cases, the Chicago Public Stock Yards was specifically named *by the consignee* or shipper as the point of delivery. (See *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193 at 195) or delivery at such yards was tacitly agreed to (see *Adams* v. *Mills*, 286 U. S. 397).

2. *Proceedings in the Courts below.*

Many similar but separate causes of action against Defendants severally, arising on separate bills of lading, were joined in the original complaint herein, filed in the State Courts, such joinder of Defendants, and of causes of action, being authorized by the provisions of Section 148, Chapter 110 of Smith-Hurd Illinois Annotated Statutes. (Illinois Civil Practice Act, 1933, Section 24.) The complaint was filed in the Circuit Court of Cook County, Illinois, and removed to the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter styled the District Court), on motion of

*See footnote, page 3, *supra*.

the carriers. (R. 38-40.) Carriers then moved to dismiss, on three grounds (R. 40-46), only the first of which is involved here, to wit: that the District Court was without jurisdiction of the cause for lack of prior consideration by the Interstate Commerce Commission.

The District Court sustained carriers' motion upon all three grounds. (R. 53-55.) Plaintiff appealed to the United States Circuit Court of Appeals for the Seventh Circuit (hereinafter styled Circuit Court), alleging error in all three respects. (R. 55-67.) The Circuit Court passed upon but one of the three questions appealed, and affirmed the lower court on the sole ground that Armour's action for damages for misdelivery lay within the exclusive jurisdiction of the Interstate Commerce Commission. (R. 77-86, 91-92.) On rehearing, after the Commerce Commission had passed upon a related question arising under Section 1 of the Act, on complaint of a different shipper, the Circuit Court affirmed its prior decision. (R. 91-92.)

The Basis for the Jurisdiction of This Court to Review the Judgment in Question.

1. The statutory provision believed to sustain the jurisdiction of this Court is Section 347 (a) of Title 28, U. S. Code Annotated. (Quoted in full in Appendix A of brief filed herewith.)

2. This petition was filed in this Court within the time required by Section 350, Title 28, U. S. Code Annotated. (Quoted in full in Appendix A of brief filed herewith.) The first decision of the Circuit Court of Appeals was made April 4, 1940. The decision of that Court on petition for rehearing was made May 21, 1940. The mandate of that Court has been stayed to August 1, 1940 to permit the filing of this petition. The time for filing this petition did not begin to run until May 22, 1940 (*U. S.* v. *Ellicott*, 223 U. S. 524), so the petition is seasonably filed.

3. The case involves the jurisdiction of the District Courts of the United States, under Sections 9 and 22 of the Act to Regulate Commerce (Sec. 9 and 22, Title 49, U. S. Code Annotated, to hear and determine a series of similar and properly joined causes of action against the Defendants severally, arising from the misdelivery of property transported in interstate commerce by carriers, in violation of the common law duties of such carriers defined by this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, without prior recourse to the Interstate Commerce Commission; together with other related questions arising under the federal law of carriers of property in interstate commerce.

4. The case believed to sustain the jurisdiction of this Court is:

Mitchell Coal and Coke Co. v. *Pennsylvania R. R.*, 230 U. S. 247 at 250 (and cases there cited).

("The order of dismissal was founded on the denial of jurisdiction, and this court has power to review that ruling.")

QUESTIONS PRESENTED.

The following questions are presented for the consideration of this Court:

1. Under Section 22 of the Commerce Act (Sec. 22, Title 49, U. S. C. A.) have the Federal or State Courts original jurisdiction of an action against a common carrier for damages, arising from a delivery of a consignee's property, at destination, to a third person not entitled to receive possession of such property as consignee's agent, before any tender of such property or opportunity to receive it, has been offered to consignee, and with full knowledge that such third person will never effect delivery to the owner, until some additional sum, not a transportation charge, is paid to such third person?

2. May a common carrier of property in interstate commerce by railroad, naming rates to a station in its published tariffs, lawfully refuse to effect a delivery to consignee at any point within the limits of that station, except to a point at which consignee can gain access to, or egress to a public street from, or possession of his property, only by paying an extra charge he had never contracted to pay, and a charge levied for a service consignee did not request or desire?

3. On motion to dismiss, may a Federal Circuit or District Court so far depart from the usual and accepted course of procedure on such motions, as to challenge and dispute, rather than accept the facts alleged in the complaint, substitute other facts, not alleged in the complaint, and sustain or deny the motion upon such substituted facts?

4. Has the Interstate Commerce Commission *any* jurisdiction over a cause of action, not grounded in some way upon some violation of some provision of the Interstate Commerce Act, by a carrier subject thereto?

5. Assuming that the complaint alleges a cause of action for overcharge, in excess of published tariff rates, in violation of Section 6(7) of the Interstate Commerce Act, is the jurisdiction of that question by the Commission exclusive, or merely concurrent at

the election of the Plaintiff, under Section 9 of the Commerce Act?

6. Are the common law duties of a common carrier by railroad any different with respect to livestock which it elects to deliver at a public stock yard, than they are with respect to livestock which it elects to deliver at the same station, at some point other than a public stock yard?

7. May a common carrier of property by railroad in interstate commerce, affect or change its common-law, common-carrier duties, and control the tribunal in which it may be sued, for misdelivery of property transported by it, by selecting, without consent of the consignee, a public stock yard located within the limits of the destination station, as the only point within which it will make a delivery of property transported, to the consignee entitled to receive it?

8. Can a finding of the Commerce Commission, in one proceeding that a certain carrier practice is not unreasonable in violation of Section 1 of the Commerce Act, constitute a bar to the recovery, by another shipper, in another proceeding, of overcharges in excess of tariff rates, collected by carriers in violation of Section 6(7) of the Commerce Act; that is: is the prohibition of Section 6(7) of the Commerce Act, against collecting more than the tariff charge, in any way dependent upon the reasonableness of the overcharge under Section 1 of the Act?

Special and Important Reasons for Review of the Decision of the Circuit Court on Writ of Certiorari.

The review sought is based upon the following reasons, each of which is later fully explained.

1. The decisions of this Court bearing upon the case at bar, are conflicting upon the question of whether the common law duties of a common carrier by railroad are changed, when livestock is delivered at a public stock yard, rather than at some other point at the same station, which conflict should be settled by this Court.

2. In a case presented solely on motion to dismiss, the Circuit Court, in disputing facts plainly alleged in the complaint, and in substituting *ex parte* facts therefor, decided a moot case and failed to decide the case presented; thereby so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of the supervision of this Court.

3. The decision of the Circuit Court is probably in conflict

(a) with the decisions of this Court on questions of Federal Law.

(b) with the great weight of authority, on a point of general law; such weight of authority consisting of the decisions of this court, of the Federal Circuit and District Courts; of the State Courts, and of the Interstate Commerce Commission;

(c) with the decisions of the Circuit Court of Appeals for the Eighth Circuit on questions of Federal jurisdiction;

(d) with the decision of the Supreme Court of Illinois on an important question of local law.

1. The Conflict in the Decisions of This Court Upon the Question of the Common Law Duties of a Common Carrier, With Respect to the Delivery of Livestock Transported in Interstate Commerce.

The conflict in the decisions of this Court exist between the decisions of this Court in the following cases, in the following respects:

This Court has considered four cases involving deliveries of livestock at public stock yards. In the first of these, *Covington Stock Yards* v. *Keith*, 139 U. S. 128, as in the case at bar, the shipper had no voice in the selection of the public stock yards as the point of delivery, that selection being made *solely* by the *carrier*.

The remaining cases involve livestock deliveries at the public stock yards in Chicago, and in two of those cases the delivery at that point was directed, or acquiesced in by the *consignee or shipper*. (See *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193 at 195.) (*Adams* v. *Mills*, 286 U. S. 397.)

In the *Covington* case (139 U. S. 128) this Court established the principle, without qualification, that a common carrier of livestock might select any point within the station limits, even a public stock yards, as the point for delivery of livestock shipments; that so long as no additional cost resulted to the shipper from that selection the shipper was without cause of complaint; but that a carrier refusing to deliver at any point *other than* a public stock yards breached his contractual and common law duties when such delivery imposed extra expense upon the shipper.

In *Adams* v. *Mills*, 286 U. S. 397, this Court applied the same principle to the Chicago Public Stock Yards and held that the so-called unloading charge, paid by the carriers

out of the transportation rate, to their agent (the Yards Company), constituted consideration for a far more extensive service than mere unloading. This Court held (at page 414) that the carrier's transportation charge (out of which the Yards Company was paid), covered *"all services performed in connection with the shipment up to and including the placing of the stock in the pens of the commission men,"* and paid for carrier services "other than the mere unloading of cars." This language carried the carrier's duty of delivery at a public stock yard, *far beyond the mere unloading pens.* Since this decision was made after the enactment of Section 15(5) of the Commerce Act, it would appear to hold that the carrier's duty to deliver, at public stock yards, extended beyond the mere unloading pens and that such duty had *not* been limited by the passage of Section 15, Paragraph 5 of the Act.

The case of *Union Stock Yards and Transit Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188, recently decided by this Court, seems to affirm the finding in the *Adams* case. This Court there held that transportation of livestock to public stock yards ended "only after the unloading for *delivery or tender to consignee.*" The citation of the *Covington* case next following this language, connotes the thought that the tender of delivery named must be a *free* delivery, and must include free ingress to the point of tender, and free egress to a public street from the point of delivery, even though such tender was made in a public stock yard.

But intervening between the two decisions cited, this Court decided the case of *Atchison, Topeka and Santa Fe Ry.* v. *U. S.*, 295 U. S. 193. In that decision this Court used language appearing to be wholly inconsistent with the decisions in the *Covington, Adams* and *Union Stock Yards* cases.

The consignee there involved was a packing company. It had customarily taken possession of its shipments on the premises of the Stock Yards Company and driven them over a viaduct, provided by the Stock Yards Company, to their plant. This Court said, at page 201 (emphasis supplied):

> "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties for this service from mere egress such as *is included* in transportation of livestock *to destinations other than public yards.* Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."
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> * * * * *
>
> "Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with *unloading into suitable pens as is now required by Sec. 15(5).*"

By this language it appears that this Court was distinguishing between the duty of a carrier to deliver livestock at a public stock yard, and the duty of the same carrier in delivering livestock "to destinations other than public stock yards." And the last sentence above quoted seems to warrant the conclusion that the carrier's delivering responsibilities as to shipments to a public stock yards, particularly to Chicago, end with "unloading into suitable pens", whether the shipper has ingress to and egress from such pens, or not.

Thus, in the *Adams* case and the *Covington* case, and apparently in the *Stock Yards* case, this Court extends the liability of the carrier, delivering at a public stock yards, *far beyond* the unloading pens. While in the *Atchison* case it appears to terminate the liability of such carrier *at* the unloading pens.

That our interpretation of the *Atchison* decision is not without foundation may be evidenced by consider-

ing a recent interpretation of that very decision by the Interstate Commerce Commission. In *Swift and Company* v. *Alton Railroad Co., et al.*, 238 I. C. C. 179, (pages 190-196), the Interstate Commerce Commission devotes nearly six pages of its decision to an interpretation of this Court's decision in the *Atchison* case. With reference to the language of this Court last above quoted, the Commission said (emphasis supplied): "*the Court was contrasting the situation at public stock yards with the situation at livestock terminals other than public stock yards* * * *" (page 191). The conclusion of the Commission was that this Court decided, that the adoption of Section 15, paragraph 5 of the Act, by Congress, *changed the liability of a common carrier by railroad to deliver livestock when the point of delivery at destination was a public stock yard.*

As a matter of law, are the duties of a common carrier with reference to the delivery of livestock, any different as to livestock which carriers elect to deliver at a public stock yard than they are with reference to livestock consigned to, or delivered at, a destination other than a public stock yard? We respectfully submit that the conflict in the decisions above referred to, should be reconciled by this Court.

The importance of this conflict in the case at bar depends entirely upon the interpretation which this Court shall place upon the complaint herein. If this Court accepts the interpretation of the author of that complaint, and finds that no act of the Plaintiff was responsible for the use of public stock yards property; finds that such use was occasioned solely by the election of the Defendant carriers, then the case is upon all fours with the *Covington* case and the conflict above referred to is here moot, unless this Court believes that carriers

may, at their own free will, change their legal duties to a shipper by electing to use a public stock yard.

But if this Court sees no difference between the public stock yard and the railroad station *named after it;* if this Court assume that a bill of lading naming the station "Union Stock Yards, Illinois" is synonymous to, and names a destination co-extensive with, the public stock yards, in such event the conflict in the decisions of this Court become of major importance, and we earnestly request that the question above stated be answered by this Court. If the principle of the *Covington* case and *Adams* case are to be reversed at public stock yards, we think such reversal may properly come only from this Court. If the quoted statements from the *Atchison* case are to be reversed, or clarified, we earnestly submit that such clarification or reversal should come from this Court.

2. The Circuit Court, by Refusing, on Motion to Dismiss, to Accept the Allegations of the Complaint as Admitted and True; and by Substituting Ex Parte Facts for the Facts Alleged, Has So Far Departed From the Usual and Accepted Procedure As to Warrant the Exercise of This Court's Powers of Supervision.

The Circuit Court, on a motion to dismiss, has so far departed from the accepted and usual course of proceedings, as to challenge, rather than accept the facts alleged in the complaint, in the following respects:

(1) The Circuit Court finds, as a matter of fact, that a "tri-party" contractual "relationship" existed as to the shipments involved, between the Plaintiff, the carriers and the Yards Company. (R. 83, line 19; R. 84, line 11.) From this "tri-party relationship" the court constructs the administrative question of stock yards practices, upon which its decision hinges.

The complaint establishes that *no* contractual rela-

tionship of *any* kind existed between Plaintiff and the Yards Company (R. 37-38 and 12), and that such Company became involved in the transaction solely as agent of the carriers, under a sub-contract between carrier and Yards Company, under which the Yards Company was hired by the carrier, to complete the transportation contract between carrier and shipper. (R. 10, par. 14.)

In the argument contained in the supporting brief, specific allegations of the complaint are set forth, establishing the non-existence of any such "tri-party relationship". The Circuit Court must have gained this conception from prior decisions of this Court in cases involving the Chicago Yards where such a "tri-party relationship" *might* be assumed from the fact that the owner of the freight *directed* delivery of his property *at the public stock yards.* Here the owner of the property made *no* such selection but left the selection of the delivering point entirely to the carrier.* (R. 10, par. 14.) The hiring of the Stock Yards Company was the selection made by the carriers and the Plaintiff was not a party to that contract of hiring.

(2) The Circuit Court finds that Plaintiff's claim is for "overcharge", *i. e.*, collection of a sum greater than named in carrier's tariffs, for the service in question.

The complaint establishes that Plaintiff paid the *exact* charge named in the tariffs, to the Defendants. (R. 9, par. 12.) The payment made to the Yards Company, as ransom for the recovery of Plaintiff's property, after the carriers' wrongful delivery to it, was not made upon any transportation contract, and could not be an overcharge in violation of the Act, since no relation of shipper and carrier (or *no other* contractual relation) existed

* See footnote, p. 3, *supra.*

between Plaintiff and the public stock yards Company, at *any* time.

3. The Decision of the Circuit Court Is Probably in Conflict With the Decisions of This Court; of the Circuit Court of Appeals for the Eighth Circuit; of the Federal District Courts; of the Highest Courts of Several States, Including Illinois; and of the Interstate Commerce Commission, in Its Interpretation and Application of Sections 9, 12(1), 13(1), 15(1), 16(1) and 22 of Title 49, U. S. C. A.

The decisions of this Court, of the Federal District and Circuit Courts, of the State Courts, of the Federal Court for the Eighth Circuit, of the Supreme Court of Illinois, and of the Interstate Commerce Commission, with which the decision of the Circuit Court conflicts; and the particular respects wherein the decision of the Circuit Court is in conflict therewith, are as follows:

(1) With reference to the common law duty of a common carrier of livestock in interstate commerce, to effect a free delivery the Circuit Court has held:

(a) That the Federal District Courts are without original jurisdiction of a simple action for damages resulting from the carrier's wrongful delivery of livestock transported in interstate commerce (before any tender thereof had been made to consignee), to a person not entitled to receive them as Plaintiff's agent, contrary to the decision of this Court in *Galveston, Harrisburg, and San Antonio Ry.* v. *Wallace,* 223 U. S. 481, and *Atlantic Coast Line Railroad Co.* v. *Riverside Mills,* 219 U. S. 186;

(b) That where a common carrier by railroad, on its own motion, elects to tender delivery of livestock at a point selected by it, within the destination station limits (the selected point being a public stock yard, rather than some other point within the limits

of the same station), that the added costs resulting from such selection are for account of the shipper, contrary to the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, cited and followed in the recent decision of this Court in *Union Stock Yards & T. Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188;

(c) That the selection by such a common carrier of a public stock yards, rather than some other point within the station limits of the same billed destination, deprives the Courts of the power to determine what the common law duties of such carrier are, with regard to delivery, and vests in the Commerce Commission exclusive jurisdiction of a matter which would *not* be within the jurisdiction of that body, *but for* such selection of such carrier, contrary to the decisions of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128; and *Galveston, Harrisburg and S. A. Ry.* v. *Wallace*, 223 U. S. 481.

(d) That when a shipment of livestock could have been delivered at destination at a point "other than a public stock yard" the carrier was not obligated to provide ingress to the point of tender, nor egress from the point of delivery to a public street, when *it elects*, without consent of the owner, to deliver through a public stock yard (rather than some other point within the station limits at the billed destination), whether the shipment was billed to that public stock yard, by the shipper or not, unless the Commission passed upon the question; contrary to the holding of this Court in *Atchison, Topeka & Santa Fe Ry.* v. *U. S.*, 295 U. S. 193.

(e) In effect, that the mere *election* by the carrier, to deliver property through a public stock yard, rather than at another point within the limits of the same station, changes the legal duties of the carriers, and incidentally the tribunal in which those duties may be enforced, contrary to the decisions of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 182; and *Galveston, Harrisburg & S. A. R. Co.* v. *Wallace*, 223 U. S. 481; *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193; and *Union Stock Yards & Transit Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188.

(f) That decision of the Interstate Commerce Com-

mission involving the same subject matter,* (but not the same factual or contractual status) does not inure to the benefit of another shipper similarly situated, contrary to the holding of this Court in *Phillips* v. *Grand Trunk Ry.*, 225 U. S. 665, and *Lowden* v. *Simmons etc. Grain Co.*, 306 U. S. 516.

(2) With reference to the jurisdiction of the Courts and of the Commerce Commission, under Sections 9; 13(1); 15(1); 16(1) and 22 of the Commerce Act (Title 49, U. S. C. A.) the Circuit Court has interpreted and applied those statutory provisions in a way in conflict with the great weight of authority viz., the decisions of this Court, of the Circuit Courts of Appeals for the Eighth Circuit, of the Federal District Courts, of the highest courts of the States, including Illinois, and of the Interstate Commerce Commission, in one of two respects, depending upon the interpretation placed upon the complaint.

If the complaint alleges no violation of any provision of the Act by any carrier subject thereto, a condition precedent to any jurisdiction of the Commission which the Commerce Act makes necessary, is absent.

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* On petition for rehearing, Plaintiff pointed out to the Circuit Court that the Commerce Commission, since the Court's first decision, had decided *Swift and Company* v. *Alton R. R. Co. et al.*, 238 I. C. C. 179; that the Commission there found that consignee at Chicago, had the tariff option (Pg. 189) of directing delivery at this destination, (a) at the public stock yards; (b) on carrier team tracks, or (c) on industry tracks (Pg. 183, 189). It found in that case that the shipper *elected* to take delivery at the public stock yards (Pg. 189). As to such shipments it held that transportation ended at the unloading pens. It did not challenge, but adopted the ruling of this Court in *Atchison, Topeka and S. F. Ry.* v. *U. S.*, 295 U. S. 193 as to shipments delivered at "other than public stock yards".

In its petition for rehearing Plaintiff pointed out to the Circuit Court that it had *not* elected to take delivery of its shipments at the public stock yards, (as the Commission found Swift had elected), but had agreed to accept delivery there, or "at such other point" (R. 11) at which carriers tendered them, but had specified that *if* carriers elected to use the public stock yards it must be at their, the carriers' expense (R. 18, 36).

It was pointed out that Plaintiff's transportation contracts would have permitted carriers to tender delivery at team tracks, at industry tracks, or elsewhere at this station, at their election, and that the decision of the Commission as to carriers' liability when shipments were *not* billed to the public stock yards, inured to Plaintiff's benefit. Plaintiff's motion to remand to the District Court for trial in the light of the Commission's decision was denied.

On the other hand, if a violation of Section 6(7) of the Act is alleged in the complaint (viz., "overcharge") the jurisdiction of the Courts is concurrent, and, under Section 9 of the Commerce Act, Plaintiff's selection of the Courts effectively bars any jurisdiction of the Commission. Nor does the administrative question recited by the Circuit Court (the history of the yards, etc.) have *any* bearing upon the sole violation of the Act found to be involved; *i. e.*, the history of the yardage charges throws no light upon (a) what the tariff rate was, or (b) what amount over the tariff rate the Plaintiff paid. Only these questions are involved in determining an overcharge, violating Section 6(7) of the Commerce Act.

The above principles are established by the great weight of authority. Sections 9, 13(1); 15(1); 16(1) and 22 of the Commerce Act have been so interpreted and applied in the following decisions:

(1) Of the United States Supreme Court in:

Galveston, Harrisburg and S. A. Ry. Co. v. *Wallace,* 223 U. S. 481.

United States v. *Pennsylvania R. Co.,* 242 U. S. 208.

Pennsylvania R. Co. v. *Puritan Coal Mining Co.,* 237 U. S. 121.

Great Northern Ry. v. *Merchants Elevator Co.,* 259 U. S. 285.

Eastern Railway Company of New Mexico v. *Littlefield,* 237 U. S. 140.

Illinois Central R. Co. v. *Mulberry Hill Coal Co.,* 238 U. S. 275.

Pennsylvania R. Co. v. *Sonman Shaft Coal Co.,* 242 U. S. 120.

Pennsylvania R. Co. v. *Clark Coal Mining Co.,* 238 U. S. 456.

(2) Of the United States Circuit Courts of Appeal for the Eighth Circuit in:

National Elevator Co. v. *Chicago, M. & St. P. Ry. Co.*, 246 Fed. 588.

Empire Refineries v. *Guaranty Trust Co.*, 271 Fed. 668.

(3) Of the United States District Courts in:

(New York) *J. C. Francesconi & Co.* v. *Baltimore & O. R. Co.*, 274 Fed. 687 at 690, 691.

(Penn.) *Gimbel Bros. Inc.* v. *Barrett*, 215 Fed. 1004, at 1006.

(Iowa) *Storm Lake Tub and Tank Factory* v. *Minneapolis & St. L. R. Co.*, 209 Fed. 895 at 901-3.

Adams v. *Chicago Great Western R. Co.*, 210 Fed. 362 at 364, 365.

Tullar & Tullar v. *Illinois Cent. R. Co.*, 213 Fed. 280.

(4) Of the Supreme Court of various States in:

(Alabama) *Ex Parte L. & N. R. Co.*, 79 South. 139 at 140.

W. L. Shepherd Lumber Co. v. *Atlantic Coast Line R. Co.*, 112 South. 323 at 325.

(Arkansas) *Kansas City Southern Ry. Co.* v. *Tonn*, 143 S. W. 577 at 579-581.

(Illinois) *Gustafson* v. *Michigan Cent. R. R. Co.*, 296 Ill. 41 at 44-45.

(Louisiana) *Pine Tree Lumber Co.* v. *Chicago, R. I. & P. Ry. Co.*, 49 South. 202 at 204.

(Texas) *St. Louis, S. F. & T. Ry. Co.* v. *Roff Oil etc. Co.*, 128 S. W. 1194 at 1195.

(Washington) *Southern Pac. Co.* v. *Fry & Bruhn, Inc.*, 143 Pac. 163 at 166.

(5) Of the Interstate Commerce Commission in:

In re Transportation and Refrigeration of Fruit, 10 I. C. C. 360 (decided in 1904, and cited with approval by this Court in *U. S.* v. *Pennsylvania R. Co.*, 242 U. S. 208).

Blume v. *Wells Fargo*, 15 I. C. C. 53 at 54-55.

Western Stock Yards Co. v. *New York Cent. R. Co.*, 87 I. C. C. 4 at 6.

Briggs, et al. v. *Director General*, 112 I. C. C. 313 at 315.

American Fuel Co. etc. v. *Atchison, T. & S. F. Ry. Co.*, 123 I. C. C. 101 at 113.

(and fifteen other decisions cited in Appendix B to the brief filed in support hereof).

Conclusion.

In the interest of brevity, and in compliance with the Rules of this Court, petitioner does not here set forth in detail all the points that will be urged at the argument of this case on the merits, should the writ prayed for be granted, nor all of its contentions in support of such points; but in compliance with Rule 38, Par. 2 of the Rules of this Court, requiring that all issues upon which decision is requested be stated herein, petitioner here refers to and incorporates into this petition by reference, all of the matters presented in its "Statement of Points" on appeal to the Circuit Court (R. 59, 60) with the same force and effect as if herein set forth in full.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decision and decree of the United States District Court of the Northern District of Illinois, Eastern Division, and the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit, be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court shall seem just and equitable.

Most respectfully submitted,

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Chicago, Illinois, August 1st, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

against

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FOREWORD.

This brief is in reality two briefs. While the petition is not dependent upon the interpretation which this court shall place upon the complaint, the legal questions arising, and the error of the court below differ, depending upon how the complaint is interpreted.

For example: the Circuit Court finds that the complaint alleges a violation of Section 6 of the Commerce Act, thereby establishing its sole ground for Commission jurisdiction. We deny that any such allegation appears in the complaint, and reason that therefore there can be no jurisdiction in the Commission. This point is fully argued.

Next, we assume that this court will also find that the complaint alleges a violation of Section 6 of the Act. On that premise, we submit that no administrative question need be considered in deciding whether that violation exists or not. This portion of the brief is entirely moot and unnecessary, *if* the court adopts our interpretation of our complaint.

Likewise, the court finds that a contractual relationship existed between plaintiff and the public stock yards. We assert the complaint establishes no contractual relation whatever between those parties, and argue that question fully. Then, we must assume that the Circuit Court's interpretation will be found correct, and brief the error committed by the Circuit Court on that assumption. And again, our brief on this point is of a question wholly moot, if this court adopts our interpretation of our complaint.

We point out this constant alternative, as the basis for our apology for the unusual length of this brief.

The Statutes Involved.

The following statutes are involved (the applicable portions of which are fully set forth in Appendix A hereto):

Section 22 of Title 49, U. S. Code Annotated, wherein certain jurisdiction of the State and Federal Courts are reserved. (Set forth at page 47, *post.*)

Section 9 of Title 49, U. S. Code Annotated, wherein certain alternative jurisdiction between the Federal Courts and the Commerce Commission is created. (Set forth at page 47, *post.*)

Sections 12, 13(1); 15(1); and 16(1) of Title 49 U. S. Code Annotated, wherein the jurisdiction of the Commerce Commission is limited to actions grounded upon a violation of the Commerce Act, by a common carrier subject thereto. (Set forth at pages 44-47, *post.*)

Section 148, Chapter 110 Smith Hurd's Ill. Statutes Annotated, permitting the joinder of similar causes of action, and of different defendants, in ac-

tions wherein similar causes of action are involved. (Set forth at page 48, *post.*)

Opinions of the Courts Below, and Dates Thereof.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on May 31, 1939. It is reported in 27 Fed. Supp. 625, and appears at pages 46-55 of the transcript of record herein.

On appeal therefrom, the first opinion of the United States Circuit Court of Appeals for the Seventh Circuit was filed April 4, 1940. The opinion on petition for rehearing was filed May 21, 1940. Both opinions are reported in 111 Fed. (2d) 913, and are found on pages 77-86, and 91-92 of the transcript of record herein.

Grounds for Jurisdiction.

The grounds for the jurisdiction are fully stated at page 7 of the accompanying petition.

STATEMENT OF THE CASE.

Since one of the grounds for review on certiorari is the refusal of the Circuit Court, in considering a motion to dismiss, to accept the facts alleged in the complaint as admitted and true, a summary of the allegations of the complaint, with record references, appears at pages 2-5, of the petition. Briefly, the case involves the jurisdiction of the courts, and the duties and liabilities of a common carrier of livestock, in interstate commerce, under the following admitted facts.

Plaintiff made shipments of livestock on bill of lading contracts with Defendant carriers. The shipments were consigned to a station named in Defendants' tariffs as "Union Stock Yards, Illinois". At this station (but *not* comprising it) there was a public stock yard frequently used by Defendants as a delivering station for livestock shipments. There were other points at the same station at which livestock could have been delivered.

Plaintiff made no selection of any particular point at this station at which its shipments were to be delivered, leaving the selection of the delivery point to the carriers, but warned the carriers that it did not demand delivery through the public stock yards at this station, and that if the Defendants chose to make delivery at that point (rather than at other available points within the same station limits), Defendants would be expected to absorb all extra costs arising from *their* selection of the public stock yards as the point of delivery.

Defendants chose to hire the public stock yards Company as their delivering agent, and surrendered possession of Plaintiff's property to that Company before making any tender thereof to Plaintiff. That Company refused

to surrender such property to Plaintiff unless and until, Plaintiff paid them an extra charge, assessed as compensation for the use of stock yards property contracted for by Defendants.

Plaintiff demanded that Defendants pay the charges of the Defendants' agent, the Stock Yards Company, or deliver direct to Plaintiff elsewhere at this station. Defendants refused to do either. Plaintiff paid the charges of the Stock Yards Company under protest, demanded repayment from the Defendants, and brought this suit for the damages arising from Defendants' wrongful delivery to the Stock Yards Company, rather than to Plaintiff, the consignee named in the bill of lading contracts.

SPECIFICATION OF ERRORS.

1. Said Circuit Court erred in declining jurisdiction of an action for damage arising from no violation of any provision of the Commerce Act, by any carrier subject thereto; and in holding that the Commerce Commission had exclusive jurisdiction of a cause of action in no way grounded upon a violation of that Act.

2. Said Circuit Court erred in holding that the District Courts of the United States (or the State Courts) were without jurisdiction to hear a case brought against a common carrier for mere overcharges above tariff rates, collected in violation of Section 6(7) of the Commerce Act.

3. Said Circuit Court erred in holding that an action for damages arising from a common carrier's wilful delivery of Plaintiff's property, to a third person, knowing that such person was *not* authorized to receive it as Plaintiff's agent, (such delivery being made before any tender of the property had been made to Plaintiff, and before Plaintiff had been afforded any opportunity to receive or remove it), while the property was still in carrier's cars on carrier's tracks; said delivery being made with full knowledge that said third person would *never* surrender the property to the owner except on the payment of additional moneys which said owner had not contracted to pay; involved *any* administrative question requiring prior recourse to the Commerce Commission.

4. Said Circuit Court erred, on motion to dismiss, in disputing and challenging, rather than accepting the facts plainly alleged in the complaint, and in substituting *ex parte* facts for the admitted facts, as the basis for its decision on the question of jurisdiction.

5. Said Circuit Court erred in holding that a common carrier could create an administrative question by its wilful and selective act, and thereby deprive the State and Federal Courts of jurisdiction (which they would have had but for such selection), of a cause of action for damages directly resulting from such wilful and selective act.

6. Said Circuit Court erred in holding that a common carrier by railroad could alter and change its contractual obligations, and common law duties to a shipper by a wilful and deliberate selection of one point, rather than any other point within the limits of the same station, as the point of delivery of the shipment transported.

7. Said Circuit Court erred in holding that a recovery of overcharges, collected in violation of Section 6 of the Commerce Act, could not be had if such overcharges were reasonable, under Section 1 of the Commerce Act.

8. Said Circuit Court erred in holding, with no knowledge of what the evidence would be in this case, or what it was in the case of *Swift* v. *Alton Railroad,* that the Commission's decision of that case was "against Armour," and "stood in Armour's way," when the facts, the contractual status of the parties, and the questions of law involved in the two cases were entirely different.

SUMMARY OF ARGUMENT.

Point 1.

Unless the complaint alleges a cause of action of which the jurisdiction of the Commission is exclusive, the decisions of the Circuit Court must be reversed. The existence of concurrent jurisdiction of Courts and Commission is not sufficient to sustain the decisions below. (Pg. 11, *Post.*)

Point 2.

The cases of which the Commission has exclusive jurisdiction have recognized fundamental characteristics.

(1) They must involve *some* violation of *some* provision of the Commerce Act by a common carrier subject thereto.

(2) The violation of the Act must be one which exists or does not exist, depending upon whether, in the administrative judgment of the deciding tribunal, the evidence warrants the factual conclusion that the acts complained of fell within a generic description, forbidden by the Act; i. e., unreasonable, preferential, etc.

If either of these conditions be absent, there can be no exclusive jurisdiction by the Commission. (Pg. 12, *Post.*)

Point 3.

The complaint here contains no assertion that any Defendant carrier subject to the Act in any way violated any provision of that Act. (Pg. 17, *Post.*)

Point 4.

The Court's assumption that the complaint establishes an assertion of overcharge, in violation of the Act, is grounded upon a denial of certain allegations of the complaint and a complete misconception of the contractual status of the parties established by the complaint. (Pg. 18, *Post.*)

(a) Even if the complaint alleged an overcharge in violation of Section 6(7) of the Act, no decision of the administrative questions referred to is required to determine that violation. (Pg. 19, *Post.*)

Point 5.

The Circuit Court creates the only administrative question upon which its decision is grounded, by failing to accept the facts alleged in the complaint as true; thereby creating a contractual status between the parties which never existed. (Pg. 21, *Post.*)

(a) No act or wish of the Plaintiff caused the livestock in question to move through the public stock yards. (Pg. 24, *Post.*)

(b) "Union Stock Yards, Illinois", is a tariff station, within the limits of which is located the public stock yards. Plaintiff billed its traffic for delivery anywhere at this station, and not at the public stock yards. (Pg. 27, *Post.*)

(c) If the allegations of the complaint were merely doubtful or uncertain, the motion to dismiss should be denied. (Pg. 30, *Post.*)

(d) The public stock yards were used for these shipments solely because the carriers elected to make delivery there, rather than on team tracks or elsewhere at "Union Stock Yards, Illinois". (Pg. 31, *Post.*)

(e) Had the carriers paid the agent they hired, their selection of the public stock yards could have afforded no cause for complaint. (Pg. 31, *Post.*)

(f) The Court has substituted the contractual status found in other decisions, for those alleged in the complaint, thus creating the administrative questions named. (Pg. 33, *Post.*)

Point 6.

The decision of the Circuit Court is in conflict with the great weight of authority, either as to the jurisdiction of a cause of action involving no violation of the Commerce Act, or as to the jurisdiction of an action alleging a mere overcharge in excess of the tariff rate applicable. (Pg. 35, *Post.*)

Point 7.

The collection of an overcharge is positively prohibited by Section 6 of the Commerce Act. The Circuit Court has held it cannot be recovered unless it is also unreasonable, under Section 1 of the Commerce Act. (Pg. 37, *Post.*)

ARGUMENT.

POINT 1. UNLESS THE COMPLAINT ALLEGES A CAUSE OF ACTION OF WHICH THE JURISDICTION OF THE COMMISSION IS EXCLUSIVE, THE DECISION OF THE CIRCUIT COURT MUST BE REVERSED. THE EXISTENCE OF CONCURRENT JURISDICTION OF COURTS AND COMMISSION IS NOT SUFFICIENT TO SUSTAIN THE DECISIONS BELOW.

There is involved here a controversy between a shipper and a railroad. The basic question presented is whether that controversy is one which, under the provisions of Section 9, 12(1), 13(1), 15(1), 16(1) and 22 of the Act to Regulate Commerce, lies within that limited jurisdictional field requiring prior resort to, and consideration by, the Interstate Commerce Commission; or whether it may be classified with that larger class of cases, of which the courts original jurisdiction was preserved by Section 22 of the Commerce Act. We are concerned only collaterally with its classification with cases where Commission jurisdiction is optional and alternative, under Section 9 of the Commerce Act, for if it be within that class, the mere selection of the courts by the Plaintiff conclusively vests jurisdiction therein.

It follows therefore, that Plaintiff's burden of proof is *negative in nature*. If it be established that this case is *not* one of the limited class of which the Commission has exclusive jurisdiction, it matters not whether the court's jurisdiction is exclusive, or merely concurrent.

POINT 2. THE CASES OF WHICH THE COMMISSION HAS EXCLUSIVE JURISDICTION, HAVE CERTAIN RECOGNIZED FUNDAMENTAL CHARACTERISTICS:

(1) THEY MUST INVOLVE SOME VIOLATION OF SOME PROVISION OF THE COMMERCE ACT, BY A COMMON CARRIER SUBJECT THERETO, AS THE JURISDICTION OF THE COMMERCE COMMISSION IS REPEATEDLY LIMITED IN THE ACT TO A CONSIDERATION OF VIOLATIONS OF THAT ACT. (SEC. 9, 12(1), 13(1), 15(1), 16(1), TITLE 49, U. S. C. A.)

(2) THE LEGAL VIOLATION OF THE ACT CLAIMED, MUST EXIST OR NOT EXIST, DEPENDING UPON WHETHER, IN THE ADMINISTRATIVE JUDGMENT OF THE DECIDING TRIBUNAL, THE EVIDENCE WARRANTS THE INTERMEDIATE FACTUAL CONCLUSION THAT THE ACT, RATE, OR RULE COMPLAINED OF MAY BE CLASSIFIED AS UNREASONABLE, DISCRIMINATORY OR WITHIN ANY OTHER LIKE GENERIC CLASSIFICATION OF THINGS FORBIDDEN BY THE ACT.

We shall not consume much space reviewing the prior decisions of this Court, and establishing the principle of law which this Court has applied in disposing of previous cases, as within one group or the other, with resulting jurisdiction in the courts, or the Commission. An historical recital of them, and a brief summary of the principles established therein will suffice; for, in the final analysis, we must examine *this* case, and apply those recognized principles to the facts actually presented here. Therefore we shall shrink our statement of legal principles, and stress our analysis of the facts of record, *i. e.*, in the complaint, in the case at bar.

The existence of the two characteristics of this class of cases requiring primary resort to the Commission, is established by a brief consideration of the history of the litigation of this question before this Court.

Originally, the jurisdiction of all controversies between shippers and carriers lay in the courts. (*Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 at 436.) By passage of the Commerce Act the Congress codified some of the preexisting common law liabilities and created new duties and liabilities for common carriers. And most important was the creation of

the new tribunal, the Commission, and the extension of its jurisdiction to hear complaints "of anything done or omitted to be done by any common carrier * * * *in contravention of any of the provisions hereof.*" (Sec. 13(1), Title 49, U. S. C. A.) Also, the creation of the power in the Commission to hear such a complaint, and order carriers to cease and desist from acts found to be "unjust * * * or otherwise *in violation of any of the provisions of this part* (Act)"; the power to award damages "under the provisions of this part (Act) *for a violation thereof*" (Sec. 16(1), Title 49, U. S. C. A.); the limitations of the general powers of the Commission to "execute and enforce the *provisions of this part* (Act)" (Sec. 12, Title 49, U. S. C. A.); and the limitations of the alternative jurisdiction found in Section 9 (Title 49, U. S. C.) to actions for damages "for which such common carrier may be liable *under the provisions of this part* (Act)", all express, in various ways, the intent of Congress to *limit the Commission's jurisdiction to causes of action grounded upon a violation of the Commerce Act, by a carrier subject thereto.*

The fact that many acts were prohibited, both at common law and by the Act; the fact that Section 22 of the Act appeared to preserve *all* existing common law rights and remedies, in both the State and Federal Courts; and the fact that Section 9 limited the alternative jurisdiction to the Commission, and the federal (not state) courts, gave rise to a jurisdictional confusion, to clarify which a long line of decisions of this Court were required.

The first decision of this Court upon this question was the *Abilene* case. (204 U. S. 426.) In that case and others like it, this Court ruled that the question of whether a given set of facts could be deemed to show reasonable (and therefore lawful) or unreasonable (and therefore unlawful) conduct by the carriers, was not an ordinary question of fact, but was a question requiring the exercise of the informed and experienced judgment

of the single tribunal created for the specific purpose of administering the act alleged to be violated. Such was the gravamen of this Court's decision in *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304; *Texas & Pacific Ry.* v. *American Tie and Timber Company*, 234 U. S. 138; *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43; *Baltimore & Ohio R. Co.* v. *U. S. ex rel. Pitcairn*, 215 U. S. 481; *Mitchell Coal and Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, and *Director General* v. *Viscose Co.*, 254 U. S. 498.

But not always were the carriers successful in escaping the jurisdiction of the state or federal courts, on their plea of exclusive jurisdiction of the Commission. Whenever this court found that the legal wrong upon which the case was founded, was *not* a violation of the Commerce Act, it sustained the primary jurisdiction of the courts. Strangely the first of these cases involved the very breach of duty alleged in the complaint here, a failure to properly and lawfully deliver property transported. (*Galveston, Harrisburg and S. A. Ry.* v. *Wallace*, 223 U. S. 481.) To the carrier's plea of exclusive Commission jurisdiction, under the precedent of the *Abilene* case (204 U. S. 426), this court summarily distinguished the two cases in this language, at page 490 (emphasis supplied):

> "But damage caused by failure to deliver goods is in *no way traceable to a violation of the Commerce Act*, and is *not* therefore within the provisions of Sections 8 and 9 of the *Act to Regulate Commerce*. (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 208.)"

In *Pennsylvania* v. *Puritan Coal Mining Co.*, 237 U. S. 121, the Court again distinguished the case from the Abilene case and similar cases by pointing out, at page

132, that "the pleadings contain no reference to the Commerce Act". 'Such is the case at bar. To the same effect was *Eastern Ry. of New Mexico* v. *Littlefield*, 237 U. S. 240; *Illinois Cent. R. Co.* v. *Mulberry Coal Co.*, 238 U. S. 275; and *Pennsylvania R. Co.* v. *Clark Coal Mining Co.*, 238 U. S. 456.

We do not mean to imply that the court's decisions made the line of demarkation dependent solely on whether or not a violation of the Act was involved. We merely state the negative,—that *no* case was *ever* committed to the exclusive jurisdiction of the Commission unless a violation of the Commerce Act was involved. This is important, for, as we shall show later in this case, *no* carrier is here alleged to have violated *any* provision of the Commerce Act. The damage sought to be recovered arose solely from the *carriers' selection of a public stock yard, rather than a team track or elsewhere, as the point of delivery,* and *from their failure to pay the agent they had hired.*

Having established the violation of the Commerce Act as the first line of demarkation, this Court often has crossed the line and considered cases where violations of the Act *were* involved, but where the violation could be established without the need of discretionary consideration of evidence leading to *factual* conclusions of reasonableness, etc., upon which the *legal* conclusion of lawfulness or unlawfulness must rest.

Thus, in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 240, a shipper sued for an overcharge, clearly a violation of Section 6(7) of the Commerce Act. But this Court denied the carrier's plea of primary Commission jurisdiction on the ground that no experienced judgment was required to read the English language contained in a railroad tariff and decide

whether the applicable rate was this or that. So, in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, this Court found that while the Commerce Act required the carriers to furnish cars, and their failure to do so violated that Act, the Courts could hear and decide a shipper's claim for damages for their failure to furnish them.

Suffice it to say, that having first found a *possibility* of exclusive jurisdiction in the Commission by a finding that a violation of the Commerce Act *was* involved, there remains the necessity for determining whether that violation could be established by simple facts, or whether intermediate factual conclusions were required to be reached, thus presenting a question necessitating experienced, advised, and specially qualified judgment, or requiring the exercise of administrative discretion.*

We therefore approach this case from this angle.

1. Does this case involve,—and is Plaintiff's claim for damages based upon,—a violation of the Commerce Act by any Defendant thereto? If not, the Commission *can* have no jurisdiction, and the forum remains where it always was, the Courts, by virtue of Section 22 of the Commerce Act. (Title 49, U. S. C. A.)

2. Even if the case involves a violation of the Act, can that violation be established by a consideration of simple facts, or is some degree of experienced judgment and administrative discretion required to interpret those facts and reach that *intermediate factual conclusion of reasonableness,* etc.? Unless such be required there can be nothing more than concurrent jurisdiction in the Commission,

* Certain decisions of the State and Federal Courts use the loose language that resort to the Commission must be held where "questions of fact" are involved. It is obvious that any controversy between a shipper and carrier may involve a question of fact. A question of fact was involved in *Galveston, H. & S. A. Ry.* v. *Wallace*, and in the other cases cited at p. 14, *supra*. The "question of fact" requiring primary resort to the Commission, is really a question of *factual conclusion* (*e. g.*, reasonable or unreasonable) from which the legal conclusion (*i. e.*, lawful or unlawful) is drawn.

which, if existing, demands reversal of the Court below from the mere fact that Plaintiff elected the courts, rather than the Commission, as the tribunal that should hear its grievance.

POINT 3. THE COMPLAINT ALLEGES NO VIOLATION OF ANY PROVISION OF THE COMMERCE ACT, BY ANY CARRIER SUBJECT THERETO.

The absence of any such allegation can be established only after an unsuccessful search of the entire complaint. But it is significant that the Court specifically finds that no challenge of the reasonableness of any charge paid (under Section 1 of the Act) exists. (R. 81.) Nor does the Court find any violation of the Act to be involved in the complaint except an "overcharge" alleged to have been made in violation of Section 6(7) of that Act. (R. 82.)

It follows that if we establish either or both of two conditions, viz.:

(1) That the Court misconstrued the complaint, and no overcharge *is* in fact alleged, or;

(2) That the administrative consideration described by the Court, has no bearing upon the existence or non-existence of the overcharge,

we remove one or the other, or both, of the two essential conditions precedent to any jurisdiction of the Commission. If the Court misconstrued the complaint in this respect, no violation of the Commerce Act is involved and the jurisdictional requirements of Sections 9, 12(1), 13(1), 15(1) and 16(1) are not met.

On the other hand, if an overcharge is involved, but may be determined independently of the administrative matters discussed, the second condition precedent to Commission jurisdiction is done away with, and under the decision of this Court in the *Great Northern* case (259 U. S. 285), only concurrent jurisdiction by the Commission is established and the Plaintiff's election of the Courts is final.

To determine whether or not the Court misconstrued the complaint; whether a violation of Section 6 is alleged therein; and whether the administrative questions cited by the Court have any bearing upon the existence or nonexistence of such violation, it is necessary to clearly understand the facts alleged in the complaint, and *particularly the contractual status of the parties created by those facts.* And only from such an understanding can we establish the error of the Circuit Court in both the above respects.

POINT 4. THE COURT'S ASSUMPTION THAT THE COMPLAINT ESTABLISHES AN ASSERTION OF OVERCHARGE, IN VIOLATION OF THE ACT, IS GROUNDED UPON A DENIAL OF ALLEGATIONS OF THE COMPLAINT, AND A COMPLETE MISCONCEPTION OF THE CONTRACTUAL STATUS OF THE PARTIES ESTABLISHED BY THE COMPLAINT.

Two conditions must be met, before a shipper can be said to have paid an "overcharge" in violation of Section 6(7) of the Commerce Act. Those conditions are:

1. There must have been a *transportation contract,* into which were read the charges named in published, applicable tariffs, by operation of law. A mere payment of money by an individual to a person who happens to be a common carrier does not constitute an overcharge in violation of the Commerce Act.

2. The payment made by shipper on such transportation contract, to the contracting carrier, must be greater than authorized by the published tariffs constituting a part of that contract, and applicable to the shipment.

The only common carriers with whom the Plaintiff had any transportation contract, were the several Defendants (Complaint Par. 9) (R. 9). The payments made to those Defendants were the *exact amounts named in their tariffs for the service named in the contract; i. e.,* "In accordance with the tariffs * * * applicable". (Complaint Par. 12; R. 9.)

The sums paid out by Plaintiff to the Yards Company, as ransom, were *not* tariff or transportation charges of *any* common carrier (Complaint Par. 28, 31; R. 17, 19). They were paid to the Stock Yards Company under protest (Complaint Par. 32; R. 19). While the Stock Yards Company has been held to be a common carrier, Plaintiff had no transportation or other contract with that Company, as to the shipments in question (R. 10, 12; 37, 38).

Nor, can the theory of overcharge made by the carriers through a selected agent, be sustained. First, they were not transportation charges or charges published in any tariff (R. 17, 19). Nor did the stock yards exact this money as the agent of anyone, least of all the carriers. The Yards Company's letter (Ex. B, Complaint; R. 35, 36) clearly evidences the fact that these charges were collected for *its own* account, for use made of *its own* private property, which no Defendant carrier owned or controlled. (R. 35, 36).

Thus every theory upon which the Court's lone violation of the Commerce Act (the violation of Section 6 (7)) can be predicated, is negatived by the complaint.

There being no claim advanced of any violation of *any* other section of the Commerce Act, by any carrier subject thereto, there can be no jurisdiction of the Commission, as no violation of any section of the Act is involved.

(a) EVEN IF A CLAIM OF OVERCHARGE WERE FOUND IN THE COMPLAINT, IT IS NOT NECESSARY TO PASS UPON ANY ADMINISTRATIVE QUESTION REFERRED TO, IN ORDER TO DECIDE WHETHER PLAINTIFF WAS OVERCHARGED, AND THE ACT THUS VIOLATED, OR NOT.

As we have said, two simple facts are necessary to establish an overcharge, in violation of Section 6. They are:

1. That the tariff rate was, say $1.00.
2. That Defendant collected $1.10.

In the case at bar the tariff rate is not named. It is merely alleged that the exact tariff rate was paid (R. 9). But may we assume that the tariff rate was $200.00, per car, and that the Plaintiff paid that amount and $20.00 per car additional. And let us assume that both these amounts were paid *to Defendant carriers,* so that a clear violation of Section 6 will result.

The ultimate and constitutive facts which the tribunal hearing such a case must find, are the answers to these questions:

1. What was the tariff rate?
2. What did the Plaintiff pay?

The administrative question referred to by the Court, throw no light upon either question.

Can the nature of the service, of the Stock Yards Company (whether a carrier or a stock yard service) throw any light on what the tariff rate was, or what amount the shipper paid?

Does "recourse to certain facts, such as the history of the Chicago Stock Yards" or does "the use of those yards as the carriers usual place of delivery"; or does "the history of the yardage charge" (R. 84) throw any light upon what the tariff rate was? Or on what the shipper paid?

Does the existence, or nonexistence, or the details of a "tri-party relation" change the tariff rate? Or the amount which the shipper paid?

Does "inquiry into the history, usages, and actual conditions of operation at the stock yards" throw any light on what rate was in the tariff, or what the Plaintiff paid?

It is evident that, no doubt influenced by the Section 1 issue existant in the *Atchison* case (295 U. S. 193) and in the *Swift* case (238 I. C. C. 179) the Circuit Court lost

sight of the fact that the court itself, had found that there were no issue of reasonableness in this case (R. 81). It lost sight of the fact that, relevant as those questions might be if damages arising from violation of Section 1 were here involved, they are not relevant here, because the Court itself finds that the only violation of the Commerce Act involved here, is an *overcharge*, and not an unreasonable act. And the history of the yards, the yardage charges, etc., have no evidential value in determining what tariff rate was applicable to the shipment, or what amount, over and above that rate, was paid by Plaintiff.

Summarizing:

> The complaint involved no violation of Section 6(7) or of any other section of the Commerce Act. Therefore, the Commission cannot have jurisdiction.
>
> Even if the violation of overcharge be assumed, the administrative facts throw no light upon whether or not such violation existed, and the Court has concurrent jurisdiction.

We may now turn to the Court's refusal to accept other facts alleged in the complaint, and to the legal effect of such nonacceptance.

POINT 5. THE COURT CREATES THE ADMINISTRATIVE QUESTION UPON WHICH ITS DECISION HINGES, BY FAILING TO ACCEPT THE FACTS ALLEGED IN THE COMPLAINT AS TRUE; THEREBY CREATING A CONTRACTUAL STATUS BETWEEN THE PARTIES WHICH NEVER EXISTED.

We now come to a consideration of the factual case actually before the court. The complaint involves livestock shipped by the Plaintiff and reaching Chicago via the lines of the defending railroads. Waiving for the moment the responsibility for such selection, they were delivered through the pens and facilities of the public stock yards at that point.

This Court has considered several cases involving deliv-

eries of livestock by common carriers, at public stock yards. The first of these was *Covington Stock Yards* v. *Keith,* 139 U. S. 128. Two other cases involved deliveries of livestock at these very Chicago public yards (*Adams* v. *Mills,* 286 U. S. 397) (*Atchison, Topeka & S. F. Ry.* v. *U. S.,* 295 U. S. 193). An important distinction between the contractual status of the parties in these cases should be noted at the outset.

In the *Covington* case (139 U. S. 128), the *carrier alone* selected the public stock yards as the delivering point in Covington, against the shipper's desire.

In the *Adams* case (286 U. S. 397), the shipper appears to have consented and acquiesced in the carrier's selection of the public stock yards as the delivering point.

In the *Atchison,* case (295 U. S. 193) the *shipper* selected the public stock yards as the delivering point. This is clearly stated at page 195 of that decision.

It is conceivable that the liability for the extra cost occasioned by the use of a public stockyards for delivering livestock shipments, might depend upon the contractual status existing between the parties, and upon the determination of *whether the shipper, or the carrier* selected that point within the station limits as the point of delivery. Therefore it is important to determine exactly what the fact is in this case, in this respect.

As revealed by the decision of the Circuit Court (R. 92) the Chicago Public Stock Yards may have been used as the point of delivery of the shipments in question, under any one of several contracts:

First, the *shipper* may have specifically directed delivery at the public stock yards. If so, it may be argued that, having deprived the carrier of its option of selecting the delivery point within the station limits, the shipper impliedly assumed any extra expense resulting from the carrier's performance of shipper's

directions. This was the factual situation, and the contractual status of the parties in *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193. At page 195, this is clearly stated.

Second, the deliveries may have been made at the public yards by the carriers, in accordance with years of custom and usage, and the *shipper's acquiescence* therein assumed, from his failure to complain over such deliveries. In such case there might be said to be a "tri-party relation" between shipper, railroad and Stock Yards Company. This appears to be the factual situation, and the contractual status presented to this Court in *Adams* v. *Mills,* 286 U. S. 397, where consignees places of business were within the public yards area, and final delivery was made there.

Third, the deliveries may have been made at the public yards by the carriers *over the shipper's protest* and against his desire, or without his acquiescence in any such practice. In such cases, it could not be said that the shipper was in any way responsible for the use of the public stock yards, or for the costs arising from such use. Such was the situation in *Covington Stock Yards* v. *Keith,* 139 U. S. 128.

The Circuit Court clearly finds that the carriers concurrently made deliveries of livestock at this station at *several* places, viz., at the public yards, at team tracks, on industry tracks and elsewhere. It finds that any one of these places of delivery were available at the destination in question. (R. 92.)

With this election available, what light does the complaint throw upon this question?

Who hired the facilities of the public stock yards, at this station, for the delivery of the Plaintiff's shipments, and *thereby became responsible for the cost of their use?*

(a) NO ACT OF THE PLAINTIFF CAUSED THE LIVESTOCK IN QUESTION TO MOVE THROUGH THE PUBLIC STOCK YARDS.

That Plaintiff did not demand, nor request, nor concur in, any use of the public stock yards facilities is clearly established by the following allegations of the complaint:

> "That the Plaintiff had at *no* time prior to receipt of such notice, as to any of such shipments, *exercised any dominion or control,* or *given any direction* either to the *Defendant* transporting any such shipment, or to Defendants' agent, the said Stock Yards Company, as to the *time or manner of unloading, the platform at which, or the chutes or pens through or into which the said livestock was to be unloaded, or held pending tender of delivery* or in *any way directed or controlled, or attempted to direct or control either the Defendants, or any of them, or the said Stock Yards Company, in respect to unloading, yarding, driving, or handling of any shipment of said livestock,* nor had any tender of any of said shipments been theretofore made to Plaintiff, either by the Defendant who transported the same to Union Stock Yards, or by the Stock Yards Company." (R. 10; complaint Par. 14.)
>
> "On May 9, 1933, Plaintiff notified each of the Defendants, and their agent, the Stock Yards Company, in writing, that on and after May 25, 1933, it would accept delivery of all shipments of livestock * * * *either* at the unloading chutes" (of the public stock yard) "*or at such other point* at which delivery of such livestock was tendered by Defendants, *or* by their agent" (the yards company). (Complaint Par. 16, R. 11.)
>
> "Thereafter, on May 16, 1933, Plaintiff notified each of said Defendants of the aforesaid * * * demands of *their said unloading and delivering agent,* the Stock Yards Company, * * * and notified each of said Defendants, and their agent, * * * that on and after May 25, 1933, the said Stock Yards Company would have *no authority* after unloading said livestock, to accept, or receipt therefor in Plaintiff's name, or for its account; that any delivery of Plaintiff's livestock * * * to the said Stock Yards Company (other than delivery as Defendant's unloading and delivering agent) would *constitute a conversion of Plaintiff's property.*" (Complaint Par. 18; R. 12.)

The exact language of the letter pleaded in the above paragraph was:

> "You are hereby notified that on and after May 25th, 1933, the Union Stock Yards & Transit Company of Chicago, Ill. has no authority, after unloading such livestock, as your agent, in accordance with its tariff, to thereafter accept, or receipt for such livestock for us, as our Agent, for our account, or in our name."
>
> "On and after May 25, 1933, any delivery by your railroad of our livestock to the Union Stock Yards & Transit Company, of Chicago, Illinois (other than a delivery of such livestock to the Union Stock Yard & Transit Company, as *your agent,* for unloading *and delivery to us*) will constitute a conversion of our property." (Complaint Ex. E; R. 36.)

That there was no semblance of any express or implied contract between Plaintiff and the Stock Yards Company with reference to this livestock is further established by the following:

> "And at the same time, Plaintiff notified the said unloading agent of the carriers, viz., the Stock Yards Company * * * that on and after May 25, 1933, it would accept delivery of such livestock at the unloading chutes, *or at any other point where tender was made,* * * * and that on and after said date Plaintiff did not desire and would not accept or pay for any service rendered to, or facilities used by said livestock, beyond the point at which it was ready to accept such livestock, *when and where tendered,* * * * and that on and after said date the Stock Yards Company had no authority to accept, handle, or receipt for such livestock, as agent of the Plaintiff * * *." (Complaint Par. 18; R. 12, 13.)

The exact language of the notice was:

> "You are hereby advised that any and all livestock which, on or after May 25, 1933, *may* be delivered to you *by said carriers as their agent,* for unloading, and for delivery to us as consignee, in accordance with the respective contracts of carriage covering same,

> will be accepted and received by us, *from said carriers* (or from you as *their agent*) * * * that as to such stock, we *do not desire,* and *will not accept,* receive or pay for *any service or use of facilities* beyond the unloading pens which you provide *for the carriers as their agent.* * *. * that on and after said date you have no authority to accept, handle or receipt for such livestock, after unloading and until delivery to us, as our agent, in our behalf, in our name, or for our account." (Complaint Ex. F; R. 37-38.)

That no use of the public stock yards facilities was demanded by Plaintiff, for the future, is evident from the prayer of the complaint. Keeping in mind that the tariff station * "Union Stock Yards, Illinois", is not shown to be synonymous nor coextensive with the public stock yards located within the station limits (and for which the tariff station was named), (See pp. 27-30 *post*), the following prayer clearly makes any use of the public stock yards as the point of delivery, *entirely optional with the carrier.*

> "That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it at *Union Stock Yards, Illinois,* at the unloading pens of the Defendants *in the Union Stock Yards,* Chicago, Illinois, *or at such other point as same may be tendered* upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposititon of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, or *of any other person, firm or corporation;"*

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* "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits'. Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry." (*United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 at 409.)

(b) **"UNION STOCK YARDS, ILLINOIS", IS A TARIFF STATION, WITHIN THE LIMITS OF WHICH IS LOCATED THE PUBLIC STOCK YARDS. PLAINTIFF BILLED ITS TRAFFIC FOR DELIVERY ANYWHERE AT THIS STATION, AND NOT AT THE PUBLIC STOCK YARDS.**

Did the Plaintiff by billing its shipments to "Union Stock Yards, Illinois" thereby select the public stock yards, located within the limits of that station, as the delivering point?

It is not infrequent practice for a railroad station to be named after one of the principal industries located within the limits of that station. But it may not be assumed that in such cases, the industry, and the tariff station are identical, synonymous, or co-extensive.

The complaint alleges:

> "That each of Defendants * * * holds itself out, to transport * * * livestock * * * to *Union Stock Yards, Illinois* * * * and * * * does regularly transport * * * such livestock at rates named in tariffs lawfully on file * * * to *Union Stock Yards, Illinois,* and has for many years held itself out as being ready, able and willing to deliver livestock to consignee, * * * at and from *a* station or depot *located at,* Union Stock Yards, Illinois." (R. 7.)

Careless reading, ignoring the emphasized words, might lead to the assumption that "Union Stock Yards, Illinois" meant the public stock yards, and that when Plaintiff billed its shipments to "Union Stock Yards, Illinois" it was selecting the public stock yards as its point of delivery.

But other language in the complaint, permits no such interpretation. The public stock yards at Chicago is specifically described in Paragraph 3 of the complaint. (R. 6.) Its existence as a public yards is established in Paragraph 6. (R. 7.) The prior and continued use of the public yards as a livestock terminal is described in Paragraph 3. (R. 6.)

Two allegations of the complaint clearly describe the

public stock yards as *but one point within the limits of the tariff station, "Union Stock Yards, Illinois."* Those allegations appear in Paragraph 4 and 5 (R. 6, 7) as follows:

> "* * * defendants * * * have * * * continuously kept on file * * * their tariffs stating the rates * * * to their said station or depot *at* Union Stock Yards, Illinois." (R. 6.)

This allegation refers solely to publication of rates to the public stock yards which are located "*at* Union Stock Yards, Illinois."

The following paragraph covers the carriers' publication of rates to other points at the same station (referred to by the Circuit Court at R. 92), but *not specifically to the public stock yards.* The distinction between the public stock yards, and the railroad station named after them; and the inclusion of the former within the latter, is alleged as follows:

> "That each of said Defendants * * * now holds itself out, to transport * * * livestock * * * to *Union Stock Yards, Illinois, at which* Defendants maintain their common livestock depot * * *." (R. 6, 7) (viz. the public stock yards.)

The prayer of the complaint clearly distinguishes between the public stock yards, and the station "Union Stock Yards, Illinois."

> "That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it *at Union Stock Yards, Illinois,* at the unloading pens of the Defendants *in the Union Stock Yards,* Chicago, Illinois, *or at such other point as same may be tendered,* upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, *or of any other* person, firm or corporation." (R. 21.)

The constant alternatives; (either the Defendants, *or* their said agent,—the Defendants *and* their said agent);—(at the unloading chutes, *or* at such other point at said station); appearing throughout Paragraphs 14, 15, 16, 24 and 25 (R. 10, 11 and 16); the constant reference to the Yards Company solely as Defendants' agent; the lack of any reference to the public stock yards in the statement of injury (R. 15); the negation of any demand for any use of stock yard property (R. 10), and the expressed willingness to accept delivery *wherever* tendered (on or off the stock yards property) (R. 16); the continuing demand for delivery at the station designated in the tariffs viz. "Union Stock Yards, Illinois," without reference to any use of the public stock yards (R. 16); the carriers' failure to protest to their agent or to make *different* arrangements, at the station of defendants (R. 17); all combine to establish that the public stock yards was *merely a point included within the limits of the tariff station named after it.*

And finally, the alternative breach alleged, and the alternative prayer of the complaint, permit of no other conclusion:

> "* * * Defendants have breached each of their several transportation contracts * * * in failing to afford to Plaintiff, an opportunity of receiving its livestock * * * *from the unloading pens used by Defendants*" (*i. e.* the public stock yards, see par. 7, R. 7) "*at* Union Stock Yards, Illinois, or *from any point* at which delivery thereof is tendered, which opportunity has in all cases been denied * * *." (R. 17.)
>
> "* * * the claim asserted by Plaintiff against each Defendant is identical, viz., a repeated failure to *provide a place* and facilities *for free delivery* to consignee of the livestock so transported." (R. 20.)
>
> "That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it, at Union Stock Yards, Illinois, at the unloading pens of the Defendants in the Union Stock Yards, Chicago, Illinois, *or at such other*

point as same may be tendered, upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, *or of any other person,* firm or corporation." (R. 21.)

These, and other allegations of the complaint are utterly meaningless, unless the tariff station "Union Stock Yards, Illinois" is merely inclusive of the area occupied by the public stock yards, located within its limits.

(c) IF THE ALLEGATIONS OF THE COMPLAINT WERE MERELY DOUBTFUL, THE MOTION TO DISMISS SHOULD BE DENIED.

The unfortunate similarity between the name of the station described in Defendant carriers tariffs and the name of one of the industries located within the limits of that station, is no doubt confusing and has apparently confused the court below. But Plaintiff is not responsible for this similiarity in nomenclature. In such a situation we think the court should *not* have assumed that the evidence offered in support of these allegations would establish the most limited interpretation of them. We think the Circuit Court, if in doubt, should have taken the position taken by this Court in *Kansas* v. *Colorado,* 185 U. S. 125, at page 147, where the broadest interpretation of the complaint was held to be the proper one on demurrer. This principle has recently been followed by the Circuit Court of Appeals for the Eighth Circuit in *Leimer* v. *State Mutual Life Assurance Co.,* 108 Fed. (2d) 302, the Court, after reviewing the effect of the new Rules of Civil Procedure applicable to the Federal District Courts, concludes its consideration of this subject on pages 305 and 306 by stating (emphasis supplied):

"We think there is no justification for dismissing a

complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to *no* relief under *any* state of facts which *could* be proved in support of the claim."

(d) THE RUBLIC STOCK YARDS WERE USED FOR THESE SHIPMENTS SOLELY BECAUSE THE CARRIERS ELECTED TO MAKE DELIVERY THERE, RATHER THAN ON TEAM TRACKS OR ELSEWHERE AT "UNION STOCK YARDS, ILLINOIS".

From the foregoing it is evident that the Plaintiff went no further than to name the tariff station at which deliveries were to be made. Whether the public stock yards, or the team tracks or industry tracks located at that station were used, was solely up to the carrier, with one qualification. If the carrier elected to use the public stock yards (rather than team tracks, industry tracks, or elsewhere), as the delivery point, they were placed on notice that Plaintiff *would bear no part of the extra cost arising from such use of the public stock yards by the carriers.*

It is clear from the complaint, and therefore undisputed, that *no contractual relation of any kind, existed between Plaintiff and the Stock Yards Company* after May 25, 1933. Such a relation *had* existed prior to May 25, 1933. (R. 10, 11.) But by written notices, dated May 9, 1933 and May 16, 1933, that contractual relation was totally ended. (R. 11, 12.)

(e) HAD THE CARRIERS PAID THE AGENT THEY HIRED, THEIR SELECTION OF THE PUBLIC STOCK YARDS COULD HAVE AFFORDED NO CAUSE FOR COMPLAINT.

If Plaintiff wished to escape the costs resulting from the use of the public stock yards as the delivering point, why did the Plaintiff not unqualifiedly *forbid any* use of the public stock yards?

The answer is found in the opinion of this Court in *Cov-*

ington Stock Yards v. *Keith*, 139 U. S. 128. In the closing paragraph of that opinion, this Court carefully preserved this right of the carrier *to select* a single point within its station limits, at which livestock deliveries should be made. It might even select a public stock yards, "and if the appellees had been permitted to use them without extra charge for mere 'yardage' they would have been without just cause of complaint in that regard." (139 U. S. at page 136.)

These Defendants had the legal right to select the Chicago Public Stock Yards as their livestock depot within the station limits. Plaintiff could not have lawfully forbidden delivery there. But Plaintiff could, and did, make the selection of those yards *solely the selection of the carriers,* and the responsibility for payment of the *costs resulting from such selection* solely the responsibility of the carriers.

The complaint establishes these facts beyond dispute:

1. That the public stock yards in Chicago, was but *one of several* available delivering points within the limits of Defendants' tariff station "Union Stock Yards, Illinois." (R. 92.)

2. That Plaintiff billed its shipments only to the tariff station, and *not* to the public stock yards, leaving it optional with the carrier to select any point within the limits of that station,—public stock yards, team tracks, industry tracks, or any other selected point,—as the point at which delivery would be accepted,—with the proviso that if Defendants selected the public yards, they must stand all added expense resulting from such selection.

3. That Defendants, being free to select team tracks, or any conceivable point within the station limits, selected the public stock yards; hired them to unload and deliver the animals, then refused to pay their selected agent the charges it demanded in consideration of the service the carriers had engaged, except the charge assessed for unloading.

(f) THE COURT HAS SUBSTITUTED THE FACTS, AND THE CONTRACTUAL STATUS EXISTING IN THE ATCHISON AND SWIFT CASES FOR THOSE ALLEGED IN THE COMPLAINT AND THUS CREATED THE ADMINISTRATIVE QUESTION WHICH IS MADE TO CONTROL.

There is no way in which the rights of a litigant can be more greatly prejudiced than by the Court's denial of jurisdiction of a cause, the denial being based upon a misconception or erroneous construction of the complaint.

Nor can we conceive of more appropriate grounds for intervention of this Court than in a case where there appears in the complaint a clear allegation of, let us say, diverse citizenship; and where the lower court denies jurisdiction on the sole ground that no such allegation appeared in the complaint.

We do not mean to imply that the Circuit Court wilfully misread or misquoted the complaint here. But from the fact that the decision states many historical facts, *not* from the record, but from the earlier decisions of this Court in *Adams* v. *Mills*, 286 U. S. 397, in *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193, and other cases involving the Chicago yards, we believe the Court unwittingly gained the impression, and just assumed that the facts, and the contractual status set forth in those decisions, continued and still existed. In other words, we believe that the Circuit Court based its decisions upon the facts stated by this Court in its previous decisions with reference to *other* controversies, rather than upon facts alleged in the complaint, wherein the Plaintiff carefully placed the case on all fours with the *Covington* case (139 U. S. 128) and entirely differentiated this case from the *Atchison* case (295 U. S. 193 at 195) in this respect:

In this case, and in the *Covington* case, the expense of

using the private property of a third person as carriers delivering facility, arose solely because the carrier chose that point, against the desire of the shipper.

In the *Atchison* case, but *not* in this case, the *consignee* chose the public stock yards as the delivering point to serve some purpose of his own.

Wholly ignoring the lack of any contractual relation between the shipper and the public stock yard, the Court assumed this "tri-party relation" or contractual status. (R. 83, 84.) *From this assumption emerges the administrative question upon which hinges the Court's decisio...* The truth of this statement becomes evident by considering a few simple questions:

Had the carriers elected (as they might have done) to make *team track* delivery, what would have been the relevancy of the "practices at those yards" (R. 83); of "the practice of the carriers and the Yards Company" (R. 84), of "whether it (the service of the Yards Company) is one which the rail carriers are bound to furnish" (R. 84); of "the history of the Chicago Stock Yards; the use of those yards as the carriers' usual place of delivery; the history of the yardage charge." (R. 84.)

Or of what moment would any "inquiry into the history, usages, and actual conditions of operation at the stock yards" (R. 84) have been, *if carriers had chosen to tender delivery on team tracks?*

Thus, the *election of the carriers* creates the only administrative question pointed to by the Circuit Court.

POINT 6. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH THE GREAT WEIGHT OF AUTHORITY UPON A JURISDICTIONAL POINT; VIZ., THE DECISIONS OF THIS COURT; OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT; OF THE FEDERAL DISTRICT COURTS, OF THE STATE COURTS, AND OF THE INTERSTATE COMMERCE COMMISSION.

Several of the decisions with which the decision of the Circuit Court are claimed to conflict, are cited, and apparently followed by the Court. The departure from those decisions becomes apparent when we compare the legal conclusions of the Court, with the facts of record as they are, and the contractual status resulting, rather than with the facts and contractual status which the Circuit Court assumes to exist.

We have shown that the public stock yards became involved in this case solely through the act of the defending carriers, and that the administrative questions cited by the Court arose solely because of that selection by the carriers.

We have further shown that in fact there was no sum paid by Plaintiff to any carrier *with whom it had a transportation contract,* except the exact sum named in the tariffs of those carriers, and that no carrier violation of any provision of the Commerce Act caused the damage sought to be recovered.

In the alternative, we have assumed that a violation of Section 6(7) (overcharge), was asserted in the complaint. Upon that assumption we have shown:

(1) That no question, requiring any administrative judgment or discretion, had to be determined before either the rate named in the tariff, or the amount paid by the Plaintiff, could be ascertained, and the overcharge, or its extent, be determined. Or, conversely;

(2) That the administrative questions named by the Court had no bearing upon what the tariff rate was, or upon what amount the Plaintiff paid, hence could not determine whether overcharge existed or did not exist.

Applying the conclusions of the Court to the facts, and to the contractual status of the parties actually existing, we find some radical departures from the great weight of authority, not only upon the jurisdictional question, but upon the Federal law of common carriers.

A consideration of these instances brings us back to a ground previously established herein, viz., (1) that a violation of the Commerce Act is a first condition precedent to Commission jurisdiction; (2) that if a violation of Section 6(7) be assumed, the true facts here present no unusual question calling for the experienced discretion and informed judgment of the Commerce Commission.

One of the legal consequences of the Court's disregard of the fact that the carriers alone were responsible for the livestock ever going through the public yards is this:

If, on Shipment A, a carrier elects to make *team track* delivery, the consignee is entitled to a "mere way out to the public highways", which, as a matter of law is "incidental to, and part of delivery". (R. 80). But if, on Shipment B, a carrier elects to use a public stock yards, all these historical considerations arise, and only the Commission has jurisdiction to decide whether the consignee is entitled to get out without added expense or not. This is to hold that *the carriers' selection alone, may not only change its duties of delivery, but that such selection may determine the tribunal in which it may be sued.* This doctrine is obviously contrary to the ruling of this Court in *Coving Stock Yards* v. *Keith*, 139 U. S. 128.

This misconception of the contractual status of the parties has caused the Circuit Court to deny jurisdiction of a simple action for damages for wrongful delivery although this Court has specifically stated that such damages were "in no way traceable to a violation of the Commerce Act" (*Galveston, Harrisburg & S. A. Ry.* v. *Wallace*, 223 U. S.

481 and cases cited at page 20 of the petition herein), and notwithstanding that the Commerce Commission has from the beginning refused to take jurisdiction of such causes (see cases cited at page 22 of the petition herein and in Appendix B hereto).

The same misconception has caused the Circuit Court to deny jurisdiction of a cause where it points to no violation of the Commerce Act except a mere overcharge which this Court has held lay within the concurrent jurisdiction of the courts (*Great Northern* v. *Merchants Elevator Co.*, 259 U. S. 285).

In both these respects, the Circuit Court has decided contrary to decisions of the Court of Appeals for the Eighth Circuit in *National Elevator Co.* v. *Chicago, M. & St. P. Ry. Co.*, 246 Fed. 588, or *Empire Refineries* v. *Guaranty Trust Co.*, 271 Fed. 668. In the former it was held that jurisdiction of the courts and the Commission was concurrent, when the involved violation of the Act was mere overcharge, and in the latter, that the Court's jurisdiction was exclusive, where no violation of the Commerce Act was involved. We shall not repeat the many decisions of the other State and Federal Courts, following one or the other of these two latter cases (cited at pages 21, 22 of the petition herein).

POINT 7. THE COLLECTION OF AN OVERCHARGE IS POSITIVELY PROHIBITED BY SECTION 6 OF THE COMMERCE ACT. THE CIRCUIT COURT HAS HELD THAT IT MAY NOT BE RECOVERED UNLESS THE CHARGE MADE IS ALSO UNREASONABLE UNDER SECTION 1 OF THE COMMERCE ACT.

A startling result of this misconception is the holding of the Circuit Court to the effect that an overcharge collected in positive violation of Section 6(7) of the Commerce Act, *cannot be recovered unless it is also unreasonable,* and also in violation of Section 1 of the Act.

We turn to the Court's decision on rehearing, wherein it comments upon the contemporaneous decision of the Com-

merce Commission in *Swift & Company* v. *Alton Railroad Co.*, 238 I. C. C. 179.

We have previously pointed out that only in the *Covington* case (139 U. S. 128) has this Court *ever* considered a case on all fours with the case at bar; *i. e.*, a case where the use of public stock yard facilities for delivering livestock and the resulting expense, had been *forced* upon a shipper, without his desire, by the carrier's election. We have also pointed out that in at least two of the three cases decided by this Court, involving the carrier's delivering responsibility at the Chicago Stock Yards, the shipper had either directed or consented to the delivery through the public stock yards.

The *Swift* case (238 I. C. C. 179) recently decided by the Interstate Commerce Commission, like the two cases last above mentioned, also involves deliveries by carriers at the Chicago Public Stock Yards. And, like those two cases, it was decided on the theory that the stock yard delivery was there selected by the shipper. At page 189 of the decision the Commission stated:

> "It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards, *only* when complainant" (Swift) "*elects* to take delivery there."

Factually, that case and this, present this same great difference, in the contractual status of the parties: There, delivery at the public stock yards was at *shipper's* direction. Here, delivery there was solely at *carrier's* election. And, in both cases, *other points* of delivery at the same station were patently available. (238 I. C. C. at 189.) (R. 92.) As a result, the consignee's contractual relation to the public stock yards was entirely different in the two cases.

Legally, the cases present two wholly unrelated legal questions. The sole violation of the Commerce Act upon

which the Circuit Court here grounds its Commission jurisdiction, is "*overcharge*" in violation of *Section 6* of the Act. (R. 82.) The *Swift* case involved *only* a violation of *Section 1* of the Act, viz., an *unreasonable practice.* (Page 180 of that decision.)

The Circuit Court finds no assertion of unreasonableness, in violation of *Section 1* of the Act in this case. (R. 81.) But it holds that our complaint alleges that the carriers violated Section 6 of the Act, and charged us more than their tariffs permitted (R. 82) on traffic which went to the public stock yards only because carriers elected to take it there.

This Court has held that cases involving violations of Section 1 (unreasonableness) were exclusively for the Commission (*Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426). This Court has held that cases involving only "claim based on overcharge, plainly a violation of the statute" (R. 82) might be decided by the courts, without prior recourse to the Commission (*Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 240). Therefore, merely because the *Swift* case, involving *only Section 1* was submitted to and decided by the Commission, it does *not* follow that this case involving, as the Court says, merely a violation of the overcharge Section, (6), must also be submitted to the Commission. Yet the Circuit Court has ruled otherwise. (R. 82.)

The Circuit Court has gone further than this. It has held that the Swift case, involving only *Section 1* of the Act, makes this case, which the Court itself says involves only *Section 6, res adjudicata.* It has held that the Swift case, involving a contractual status arising from Swift's election to use the public stock yards, makes this case, involving *no* such contractual status, *res adjudicata.* The only possible *conclusion is that because the carriers' practices as to livestock directed into the public stock yards by Swift,*

were reasonable, Armour is to be barred from collecting its overcharges on livestock which need not have gone near the public stock yards.

This odd conclusion is the only one that can be drawn from the language of the Circuit Court:

> "Since our decision the Interstate Commerce Commission has adjudicated the administrative problems against Armour." (R. 91, 92.)
>
> "* * * the adverse administrative adjudication stands in Armour's way." (R. 92.)

How the Commission's decision of the reasonableness of a practice (Section 1) could be "against Armour," claiming (so the Circuit Court says) *only* "overcharge" (Section 6), (R. 82) is not made clear. Even had Armour followed Swift's practice and billed its traffic to the public stock yards, it does not follow that simultaneously, Swift might not have attacked the reasonableness of the carriers' practices under Section 1 of the Act before the *Commission*, and Armour proceeded in *court* to recover a tariff overcharge in violation of Section 6.

We have understood the law to be that a tariff overcharge, such as the Court finds is involved here, is forbidden by law. (Sec. 6(7), Title 49, U. S. C. A.) It is recoverable, as a matter of law, regardless of its reasonableness under Section 1. We are aware of no decision of this Court or of any other court, holding that the recovery thereof may be barred, by a finding that the tariff overcharge paid was "not unreasonable."

The only possible conclusion to be reached from the decision of the Circuit Court is, that a carrier may defend a suit for overcharge in excess of tariff rates on the ground that the excess charges exacted were not unreasonable; and that a violation of Section 6 (overcharge) need not be refunded unless the same charge *also* violates Section 1, by being unreasonable. Such a ruling emasculates the provisions of Section 6 entirely, and materially effects the jurisdiction of the courts over such questions.

Conclusion.

It is respectfully submitted that this Court should exercise its supervisory powers for the following reasons:

1. The conflict between the decision of this Court in the case of *Atchison, T. & S. F. Ry.* v. *U. S.*; 295 U. S. 193, (as interpreted by the Interstate Commerce Commission) on the one hand; and its decision in *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Adams* v. *Mills*, 286 U. S. 397; and *Union Stock Yards & T. Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188) on the other hand; should be removed, and the question of whether or not a delivery of livestock at a public stock yards, imposes any different duties upon a common carrier than a delivery at a point other than a public stock yard, definitely settled.

A corollary question arises, which we believe should also be decided. Is the duty of a carrier, with reference to livestock delivered at a public stock yard any different, when the carrier selects that point of delivery, than when the consignee or shipper directs delivery at that point?

2. The principle announced by this Court in *Kansas* v. *Colorado*, 185 U. S. 125; and by the Circuit Court of Appeals for the Eighth Circuit in *Leimer* v. *State Mutual Life Assurance Co.*, 108 Fed. (2d) 302, should be applied, and the complaint interpreted thereunder. The opinion of the Circuit Court should be corrected to reflect the facts alleged in the complaint, and the jurisdiction under those facts should be considered, rather than the jurisdiction under facts gleaned from prior decisions of this Court involving *different* facts, and *different* contractual situations between the parties.

3. The conclusions of the Circuit Court should be correspondingly corrected, by being drawn from the facts actually presented by the complaint, so that those conclusions will be in harmony with the decisions of this Court, of the Federal Circuit and District Courts, of the State Courts, and of the Interstate Commerce Commission, in its interpretation and

application of Section 9; 12(1); 13(1); 15(1); 16(1); and 22 of the Act to Regulate Commerce (Title 49, U. S. C. A.).

Most respectfully submitted,

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APPENDIX A.

Statutes Involved in This Proceeding.

(Applicable portions are emphasized by the author.)

1. Federal Statutes establishing the jurisdiction of this Court.

Sec. 347 (a), Title 28, U. S. C. A.:

"(Judicial Code, section 240, amended.) Certiorari to circuit courts of appeal and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Sec. 350, Title 28, U. S. C. A.:

"Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari. No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made *within three months after the entry of such judgment* or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

"Where an application for a writ of certiorari is

made with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia before the court wherein the same is pending has given a judgment or decree the application may be made at any time prior to the hearing and submission in that court.

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree *may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court.* The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer all damages and costs which the other party may sustain by reason of the stay."

2. Federal Statutes establishing jurisdiction of the courts and of the Commission over controversies between shippers and carriers in interstate commerce.

(1) Statutes defining jurisdiction of the Interstate Commerce Commission:

Sec. 12(1), Title 49, U. S. C. A.:

"(1) Authority, duties, and proceedings of commission; witnesses.

"The commission created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is authorized and required *to execute and enforce the provisions of this chapter;* and, upon the request of

the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the *enforcement of the provisions of this chapter* and for the punishment *of all violations thereof,* and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and *for the purposes of this chapter* the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

Sec. 13(1), Title 49, U. S. C. A.:

"Complaints to and investigations by commission.—(1) Complaint to commission of violation of law by carrier; reparation; investigation. Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything *done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof,* may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Sec. 15(1), Title 49, U. S. C. A.:

"(1) Commission empowered to determine and prescribe rates, classifications, etc. Whenever, after full hearing, upon a complaint made *as provided in section 13 of this chapter,* or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the *commission shall be of opinion that any* individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, *or otherwise in violation of any of the provisions of this chapter,* the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Sec. 16(1), Title 49, U. S. C. A.:

"(1) Orders by commission for payment of damages. If, after hearing on a complaint *made as provided in section 13 of this chapter,* the commission

shall determine that any party complainant is entitled to an award of damages under *the provisions of this chapter for a violation thereof,* the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

(2) Statutes establishing concurrent jurisdiction of certain controversies in the Commerce Commission and in the Federal Courts.

Sec. 9, Title 49, U. S. C. A.:

"Remedies of persons damaged; election; witnesses. Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable *under the provisions of this chapter,* in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

(3) Statutes reserving jurisdiction in the Courts.

Sec. 22, Title 49, U. S. C. A.

"* * * nothing in this chapter contained shall in any way *abridge or alter the remedies now existing at common law or by statute,* but the provisions of this chapter are in addition to such remedies; * * *."

3. Federal Statutes prohibiting the collection of charges in excess of tariff rates, by common carriers.

Sec. 6(7), Title 49, U. S. C. A.:

"(7) Transportation without filing and publishing rates forbidden; rebates; privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive *a greater or less or different compensation* for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

4. State Statute permitting joinder of Defendants and of causes of action.

Sec. 148, Chapter 110, Smith-Hurd's Ill. Stat. Annotated:

"(Civil Practice Act, Sec. 24.) Joinder of defendants—Suing in alternative.

"(1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction *or series of transactions* out of which the same arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally or in the alternative *arising out of the same transaction or series of transactions,* regardless of the number of causes of action joined.

"(2) It shall not be necessary that each defendant shall be interested *as to all the relief prayed for, or as to every cause of action included in any proceeding against him;* but the court may make such order as may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

APPENDIX B.

Citation of cases, decided between 1904 and the present, wherein the Interstate Commerce Commission has refused to take jurisdiction of actions for damages *not* arising out of violations of the Act to regulate commerce:

In Re Transportation and Refrigeration of Fruits, 10 I. C. C. 360, at 373:

> "But this duty does not spring from the Act to regulate commerce, *nor has this Commission any jurisdiction of that matter.* It arises out of the *common-law liability* of the defendant railway companies as common carriers, and *redress for failure to fulfill it must be sought in the courts.*"

Blume v. *Wells Fargo Exp. Co.,* 15 I. C. C. 53. at 54:

> *"It was not intended by the Congress that the Commission should supplant and take the place of the courts with respect to that large class of complaints that may arise out of the failure of carriers to carry out their contracts of transportation promptly and safely, and properly to perform their duties as common carriers in the handling of shipments entrusted to them for carriage from one point to another.* As to all such claims, as we have had occasion frequently to say in connection with informal complaints of this character, the Commission is without authority to afford redress."
>
> * * * * *
>
> "Breaches of duty in that respect, such as the loss of or damage to property in transit, *the failure to make delivery safely* and with reasonable despatch *in accordance with the contract,* express or implied, which a carrier enters into when accepting a shipment for carriage, are matters that are *solely within the jurisdiction of the courts.* The complaint here, is of such a character. The damages alleged to have been sustained by the complainants did *not* arise out of the breach of any duty or obligation resting upon the de-

fendant *under the terms of the Act to Regulate Commerce*, but out of the breach of a duty imposed upon it by the common law promptly *to deliver* at a designated point a shipment which it had accepted and agreed to deliver at that point. The *only recourse that shippers have with respect to such claims for damages is in the courts.*"

Larkin v. *Erie & W. Transp. Co.*, 24 I. C. C. 645 at 646.

Criswell v. *W. F. & N. W. Ry.*, 37 I. C. C. 97 at 98.

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H. L. Buss Company v. *New York Cent. R. R. Co.*, 45 I. C. C. 161.

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Johnston v. *Charleston & West Carolina R. Co.*, 118 I. C. C. 19 at 20.

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Scott-Graff Lumber Company v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. et al.*, 132 I. C. C. 745 at 746.

Wells & Son v. *Chicago, B. & Q. Ry.*, 161 I. C. C. 145 at 148-149.

Fuel Sales Corp. v. *Delaware, L. & W. R. Co.*, 225 I. C. C. 288 at 289:

> "Complainant does not definitely assail the tariff rule providing for the water allowance, but asserts several times of record that it is primarily interested in the loss and damage sustained. Defendant rightly objects to the Commission assuming jurisdiction if complainant is relying on loss in transit; as it is well settled that *our jurisdiction does not extend to loss and damage claims.*"

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

against

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF FOR PETITIONER.

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Chicago, Illinois, December 2nd, 1940.

THE GUNTHORP-WARREN PRINTING COMPANY, 549 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,

Petitioner,

against

E ALTON RAILROAD COMPANY, A CORPORATION,

ET AL.,

Respondents.

BRIEF FOR PETITIONER.

Definition of short terms used herein.

the interest of simple statement the words and
es listed below will be used throughout this brief in
f the more complicated but technically accurate lan-
e describing the same person or thing.

TATE COURT". The Circuit Court of Cook County, Il-
, wherein this cause was first begun, and from which
ause was removed to the Federal Court.

ISTRICT COURT". The District Court of the United
s for the Northern District of Illinois, Eastern Divi-

IRCUIT COURT". The United States Circuit Court of
als for the Seventh Circuit.

"ARMOUR". The plaintiff, appellant and petitioner, Armour and Company, described in the opening paragraphs of the Complaint. (Rec. 3, 4.)

"RAILROADS" or "RAILROAD". The defendant common carriers by railroad (or one of them) named as such in the complaint. (Rec. 3, 4.)

"UNION STOCK YARDS, ILLINOIS". The entire railroad station "area",* to which the railroads are engaged in transporting "property, including ordinary livestock." (Rec. 5.)

"PUBLIC YARDS". The public stock yards under jurisdiction of the Secretary of Agriculture "located at" the station Union Stock Yards, Illinois, but not comprising it. (Rec. 6, 7.)

"YARDS COMPANY". The Union Stock Yard and Transit Company, owner of the public yards, located within the limits of the railroad station area described in applicable railroad tariffs as "Union Stock Yards, Illinois".

"TEAM TRACKS". Tracks situated at the station "Union Stock Yards, Illinois" owned or used by the railroads, not serving the public yards, but available for tender of delivery of property consigned to that station to consignees. (Rec. 91, 92.)

"INDUSTRY TRACKS". Tracks owned by industries located at the station, "Union Stock Yards, Illinois" (Rec. 91, 92), not serving the public yards, but available for tender of delivery of property including livestock, to the owner by railroads.

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* "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits'. Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry." (*United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 at 409.)

Reference to the official reports of this case in the Courts below.

This case was decided by the District Court on May 31, 39, and is reported at 27 Fed. Supp. 625. On appeal to e Circuit Court primary and supplemental opinions that court were handed down on April 4th and May st, 1940, respectively. Both decisions are reported at 1 Fed. (2d) 913.

The three decisions appear at pages 46-55, 77-86, and -92 of the transcript of record herein.

Grounds on which the jurisdiction of this Court is invoked.

1. The petition filed herein invoked the jurisdiction of e Supreme Court established by Sec. 347(a) Title 28, S. Code Annotated (Sec. 240, Judicial Code, amended), ich reads as follows:

Sec. 347(a), Title 28, U. S. C. A.:

"(Judicial Code, section 240, amended.) Certiorari to circuit courts to appeal and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeal in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before, or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2. The petition herein was filed, after due and sufficient y of the mandate of the Circuit Court (Rec. 94), and

within the time required by Sec. 350, Title 28, U. S. Code Annotated, which provides as follows:

Sec. 350, Title 28, U. S. C. A.:

"Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari. No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

"Where an application for a writ of certiorari is made with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia before the court wherein the same is pending has given a judgment or decree the application may be made at any time prior to the hearing and submission in that court.

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer all damages and costs which the other party may sustain by reason of the stay."

The final judgment of the Circuit Court was entered

May 21st, 1940, and the petition filed herein for writ of certiorari within the three months' period provided by the section last above quoted.

3. The case involves the question of the jurisdiction of the District Courts of the United States under Sections 9, and 22, of Title 49, U. S. Code Annotated (quoted in full in Appendix A hereto) 1 and of the jurisdiction of the Interstate Commerce Commission under sections 9, 12(1), 13(1), 15(1), 16(1), of Title 49 of the U. S. Code Annotated. (Those sections are quoted in full in Appendix A hereto.)

We believe the District Court and the Circuit Court have erroneously denied their own jurisdiction, under Sections 9, and 22 of Title 49, U. S. Code Annotated, and have erroneously broadened the jurisdiction of the Interstate Commerce Commission beyond the limits thereof, as established by Congress in said Sections 9, 12(1), 13(1), 15(1), and 16(1) of Title 49, U. S. Code Annotated.

4. In *Mitchell Coal & Coke Co.* v. *Pennsylvania Railroad*, 230 U. S. 247, at page 250, the Supreme Court said:

> "The order of dismissal" (in the courts below) "was founded on the denial of jurisdiction, and this court has power to review that ruling."

Since this case presents an order of the courts below dismissing the complaint (Rec. 55, 86), which is also founded upon the "denial of jurisdiction" by those courts, it is believed the Supreme Court "has power to review that ruling".

Statement of the case.

1. *The Facts, the Cause of Action and the Questions Presented.*

(Numerical references are to pages of the record herein.)

Armour contracted, on usual bill of lading form (23-30) with the railroad, to transport a shipment of livestock from a certain origin to a station named in Defendant's tariffs as "Union Stock Yards, Illinois", and there to deliver the shipment to Armour. (9.)

Armour loaded the shipment on the railroad car at the origin point; delivered the shipment to the railroad at that point; paid the exact tariff charge applicable to the transportation service received, and in all things performed the transportation contract. (9.)

Before delivering the shipment to the railroad, Armour notified the railroad that it had cancelled all authority of and arrangements with the Yards Company, who operated a public stock yard within the station limits of the destination, under which the Yards Company had previously accepted, held, stored, weighed, driven and otherwise handled Armour's livestock as Armour's agent (10), and that the Yards Company now had no authority to accept, receipt for, handle, or otherwise serve the shipment about to be made. And Armour advised the railroad that it would accept delivery of this shipment, anywhere at this destination station that the railroad offered it; that it would even accept delivery at the public stock yards *if* the railroad would bear the expense arising from such use of the private property of the Yards Company. (11, 12; 32-36.)

The exact advice given the railroad was, that on arrival of the shipment, Armour would accept delivery "at and from such reasonable and proper delivery pens" *of the railroad,* anywhere at this station Union Stock Yards, Illi-

nois, but that it desired no stockyard service, and would pay no yardage charges or other charges for the mere delivery of the shipment, if the railroad elected to use the public yards, rather than to use pens of its own ownership. (Rec. 32, 33.)

Also previous to the acceptance of this shipment, by the railroad, the Yards Company had warned Armour, that if any of Armour's livestock came into its possession it would *never deliver them to Armour* unless Armour paid a yardage charge upon them. (35, 36.)

This threat was made known to the railroad before it undertook to transport the shipment (36) and the railroad had been warned that any delivery of the shipment to the Yards Company under such circumstances would constitute a conversion of Armour's property. (36.)

The shipment moved forward from the shipping point. When it reached the destination (Union Stock Yards, Illinois) the railroad made *no tender of the shipment to Armour*, on any team track, or any private track of Armour, in any pens controlled by the railroad, or at any other point within the station area. (10.)

On its own responsibility, and in disregard of the information it had received, the railroad placed the car in the possession and control of the Yards Company, while the livestock was still confined therein on the railroad's tracks, without consulting or advising Armour, and before making any tender of the shipment to Armour. (10.)

At no time had Armour attempted to direct or control the handling of this car at the destination station. It had not suggested any place, time, or manner of unloading, or holding pending tender of delivery of the load to Armour. (10.)

The first knowledge received by Armour, that the shipment had arrived, came in the form of a notice, not from the railroad, but from the Yards Company, that the Yards

Company had possession of, and was holding Armour's livestock in one of its pens. (10.) Armour demanded possession of its property. Its demand was refused, unless and until Armour paid the demands of the Yards Company. (14.) In mitigation of damages Armour paid the demands of the Yards Company for the railroad's account; demanded repayment from the railroad which had employed the Yards Company. (15.) That demand being refused, it brought this action.

In the foregoing summary we have described the facts with reference to a single one of many separate causes of action joined herein. A more general statement of the facts, with record references, appears at pages 3 and 4 of the petition herein.

Since the case is here on motion to dismiss, the facts above stated stand as admitted by each defendant. (*Kansas* v. *Colorado*, 185 U. S. 125 at 147; *Leimer* v. *State Mut. Life Assoc.* (C. C. A.) 108 Fed. (2d) 302 at 306; *Grain Belt Supply Co.* v. *Commission of Int. Rev.*; (C. C. A.) 109 Fed. (2d) 490 at 492.

No rate charged or act done by the railroad is alleged to have been unreasonable, preferential, or otherwise violative of any provision of the Interstate Commerce Act. There is no question involved requiring discretionary judgment. The sole question is one of law:

Did the conduct of the railroad above described, and the railroad's wrongful delivery of Armour's property to a third person, with railroad knowledge that such third person was wholly unauthorized to receive them, and would never make free delivery, to Armour; constitute an observance, or violation of the duties imposed upon common carriers by railroad by common law? Did that conduct constitute a breach, or an observance of the railroads contract of transportation?

There is no rate to be fixed or made. There is no practice involved, to be judged reasonable, unreasonable or preferential, or non-preferential. There is no administrative question to be decided.

(2) *Procedural History of the Case:*

Section 148, Chapter 110 of Smith-Hurd's Illinois Statutes Annotated provides as follows:

"(Civil Practice Act, Sec. 24.) Joinder of defendants—Suing in alternative.

"(1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction *or series of transactions* out of which the same arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally, or in the alternative *arising out of the same transaction or series of transactions,* regardless of the number of causes of action joined.

"(2) It shall not be necessary that each defendant shall be interested *as to all the relief prayed for, or as to every cause of action included in any proceeding against him;* but the court may make such order as may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

Proceeding under that section, plaintiff filed its complaint in the State Court, joining in one proceeding, many separate causes of action against each defendant severally. The complaint sets forth facts showing that the several liability of each defendant, in each cause of action, arose "out of the same transaction or series of transactions" as required by that statute. (Rec. 11, 20.)

After removal of the cause to the District Courts, on defendants' several motions (Rec. 38-40) defendants moved to dismiss (Rec. 40-46), for want of jurisdiction of

the District Court over the cause of action set forth in the complaint. The corporate defendants advanced two grounds, and the receivers and trustees appointed by courts of the United States, a third ground.

The corporate defendants urged:

(a) that the cause of action asserted was one which could only be heard and determined in the first instance, by the Interstate Commerce Commission.

(b) that the Union Stock Yards and Transit Company was an essential party defendant. (Rec. 42.)

The defending receivers and trustees urged:

(c) that no leave had been secured by the plaintiff from the Federal Courts appointing them, authorizing the maintenance of the suit in question against them. (Rec. 74.)

The District Court sustained the motions upon all three of the grounds above stated. (Rec. 54, 55.) Plaintiff appealed to the Circuit Court which affirmed the District Court, in an opinion which made no reference to the second and third grounds above named. Upon proper stay of the mandate of the Circuit Court, Plaintiff filed the petition in this Honorable Court for writ of certiorari, which this Court has most graciously granted.

Specifications of Errors.

Our brief in support of our original petition to this Honorable Court, sets forth *inter alia,* the following specification of errors, at pages 6 and 7 thereof, and reasserts, at page 22, the specification of errors made in its appeal to the Circuit Court. (Rec. 59, 60.)

1. Said Circuit Court erred in declining jurisdiction of an action for damage arising from no violation of any pro-

vision of the Commerce Act, by any carrier subject thereto; and in holding that the Commerce Commission had exclusive jurisdiction of a cause of action in no way grounded upon a violation of that Act.

2. Said Circuit Court erred in holding that the District Courts of the United States (or the State Courts) were without jurisdiction to hear a case brought against a common carrier for mere overcharges above tariff rates, collected in violation of Section 6(7) of the Commerce Act.

3. Said Circuit Court erred in holding that an action for damages arising from a common carrier's wilful delivery of Plaintiff's property, to a third person, knowing that such person was *not* authorized to receive it as Plaintiff's agent, (such delivery being made before any tender of the property had been made to Plaintiff, and before Plaintiff had been afforded any opportunity to receive or remove it), while the property was still in carrier's cars on carrier's tracks; said delivery being made with full knowledge that said third person would *never* surrender the property to the owner except on the payment of additional moneys which said owner had not contracted to pay; involved *any* administrative question requiring prior recourse to the Commerce Commission.

4. Said Circuit Court erred, on motion to dismiss, in disputing and challenging, rather than accepting the facts plainly alleged in the complaint, and in substituting *ex parte* facts for the admitted facts, as the basis for its decision on the question of jurisdiction.

5. Said Circuit Court erred in holding that a common carrier could create an administrative question by its wilful and selective act, and thereby deprive the State and Federal Courts of jurisdiction (which they would have had but for such selection), of a cause of action for damages directly resulting from such wilful and selective act.

6. Said Circuit Court erred in holding that a recovery

of overcharges, collected in violation of Section 6 of the Commerce Act, could not be had if such overcharges were reasonable, under Section 1 of the Commerce Act.

7. Said Circuit Court erred in holding, with no knowledge of what the evidence would be in this case, or what it was in the case of *Swift* v. *Alton Railroad*,* that the Commission's decision of that case was "against Armour," and "stood in Armour's way," when the facts, the contractual status of the parties, and the questions of law involved in the two cases were entirely different.

These are here summarized as to cause, by a single specification, as follows:

8. The Circuit and District Court erred in constantly assuming, contrary to the alleged facts, that Armour desired or demanded its shipments to be delivered to it through the facilities of the Yards Company located within the limits of the destination station, and that as a result Armour was impliedly bound to make a reasonable payment to the Yards Company for such use of its property as resulted from that demand. (The similarity of name between the railroad *station* ("Union Stock Yards, Illinois") and the private property of the Yards Company, located within that station area,—frequently called the "Union Stock Yards"—no doubt contributed materially to the misconception under which the lower courts labored. The Railroad knew the description appearing in its own tariffs. Armour was not responsible for the existence of that confusing circumstance.)

Included in the specification of errors made to the Circuit Court (Rec. 59-60) and reasserted here (Petition, page 22) are the following:

> The court erred as a matter of law, in holding that defendants' agent, the Union Stock Yards Company, was a necessary party to the case for the following reasons:
>
> (1) No contract, express or implied, existed between plaintiff and said Company.

(2) The use of no property or facility of said Company or no service by said Company, was required or demanded by the plaintiff.

(3) No connection existed between said Company and any shipment involved herein by reason of any act or demand of plaintiff, but such connection as did exist, arose solely from defendants' action in refusing to tender said property at any point at said railroad station, except at a point located on the private property of said company. As a result, no obligation to pay for the use of said facilities or services existed, save on the part of defendants who had engaged them without plaintiff's consent, and against its will.

(4) Said Company had no connection with any transaction named in the Complaint, save as the employed agent of defendants.

The court erred in holding that the cause of action ated in the complaint was not one permitted to be rought against the trustee and receiver defendants ithout prior consent of the court or courts appointing ch trustees or receivers, under Section 66 of the udicial Code (Title 28, Sec. 125 U.S.C.A.).

Summary of Argument.

For convenience, we here reproduce the Summary of Argument appearing at pages 8-10 of our brief in support of our original petition herein. (Page references are to the pages of the original brief.)

Point 1.

Unless the complaint alleges a cause of action of which the jurisdiction of the Commission is exclusive, the decisions of the Circuit Court must be reversed. The existence of concurrent jurisdiction of Courts and Commission is not sufficient to sustain the decisions below. (Pg. 11.)

Point 2.

The cases of which the Commission has exclusive jurisdiction have recognized fundamental characteristics.

(1) They must involve *some* violation of *some* provision of the Commerce Act by a common carrier subject thereto.

(2) The violation of the Act must be one which exists or does not exist, depending upon whether, in the administrative judgment of the deciding tribunal, the evidence warrants the factual conclusion that the acts complained of fell within a generic description, forbidden by the Act; *i. e.*, unreasonable, preferential, etc.

If either of these conditions be absent, there can be no exclusive jurisdiction by the Commission. (Pg. 12.)

Point 3.

The complaint here contains no assertion that any defendant carrier subject to the Act in any way violated any provision of that Act. (Pg. 17.)

Point 4.

The Courts' assumption that the complaint establishes an assertion of overcharge, in violation of the Act, is grounded upon a denial of certain allegations of the complaint and a complete misconception of the the contractual status of the parties established by the complaint. (Pg. 18.)

(a) Even if the complaint alleged an overcharge in violation of Section 6(7) of the Act, no decision of the administrative questions referred to is required to determine that violation. (Pg. 19.)

Point 5.

The Circuit Court creates the only administrative question upon which its decision is grounded, by failing to accept the facts alleged in the complaint as true; thereby creating a contractual status between the parties which never existed. (Pg. 21.)

(a) No act or wish of the plaintiff caused the livestock in question to move through the public stock yards. (Pg. 24.)

(b) "Union Stock Yards, Illinois", is a tariff station, within the limits of which is located the public stock yards. Plaintiff billed its traffic for delivery *anywhere* at this station, and not at the public stock yards. (Pg. 27.)

(c) If the allegations of the complaint were merely doubtful or uncertain, the motion to dismiss should be denied. (Pg. 30.)

(d) The public stock yards were used for these shipments solely because the carriers elected to make delivery there, rather than on team tracks or elsewhere at "Union Stock Yards, Illinois". (Pg. 31.)

(e) Had the carriers paid the agent they hired, their selection of the public stock yards could have afforded no cause for complaint. (Pg. 31.)

(f) The Court has substituted the contractual status found in other decisions, for those alleged in the complaint, thus creating the administrative questions named. (Pg. 33.)

Point 6.

The decision of the Circuit Court is in conflict with the great weight of authority, either as to the jurisdiction of a cause of action involving no violation of the Commerce Act, or as to the jurisdiction of an action alleging a mere overcharge in excess of the tariff rate applicable. (Pg. 35.)

Point 7.

The collection of an overcharge is positively prohibited by Section 6 of the Commerce Act. The Circuit Court has held it cannot be recovered unless it is also unreasonable, under Section 1 of the Commerce Act. (Pg. 37.)

In this brief we will not again present our arguments upon the above points, but in the interest of brevity will

ncorporate those arguments appearing at pages 11-41 of ur original brief, by reference, and the reasons therefor:

We shall here concern ourselves more with the discussion of a common cause underlying the errors specified. Here, we shall consider the decisions of the District and Circuit Courts more broadly, and attempt to establish as nescapable the following conclusion:

Point 8.

At the root of each error hereinbefore specified, lies the Court's misconception of the legal relationship which existed, between Armour, the railroad, and the Yards Company. The lower court has assumed the legal relationship of the parties existing in other cases considered by this Honorable Court, and existing in *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179, to also exist here. Such assumption is negatived by the facts presented, and admitted here.

(1) A new factual situation is presented here, differing from that considered by this Court in prior cases.

(2) The *Hygrade* case (295 U. S. 193) involved a trilateral contractual relationship which does not exist in the case at bar.

(3) The *Swift* case (238 I. C. C. 179) involved a trilateral contractual relationship which does not exist in the case at bar.

(4) The finding that the Yards Company is a necessary party defendant is grounded upon a misconception of the contractual status of that company in this case.

(5) The Circuit Court's finding of "overcharge" in violation of the Commerce Act, is grounded upon the same misconception of fact and of contractual status.

(6) The Court's findings that administrative action is necessary to determine the existence of overcharge, is grounded upon the same misconception of fact and of contractual status.

(7) The same misconception of fact and of contractual status constitutes the basis for the Circuit Court's decision that the case of *Swift & Co.* v. *Alton R. Co.* (238 I. C. C. 179) "stands in Armour's way."

(8) The same misconception of fact and of contractual status, are probably responsible for the failure of the Circuit Court to note that the *Galveston* case (223 U. S. 481) and the *Covington* case (139 U. S. 128) are on factual fours with the case at bar, and are therefore controlling.

(9) The same misconception of fact, and of the remedy sought underlies the decision of the District Court that the federally appointed trustee defendants could not be sued here without the consent of the appointing courts.

Conclusion.

When the controlling issues of fact raised by the complaint, and the involved principles of law are correctly comprehended, it appears that there is no question of fact here requiring the peculiar qualifications of the Commission for decision, nor any question of law presented, which has been committed by Congress to the exclusive jurisdiction of the Commerce Commission.

ARGUMENT.

Every material error of the lower courts herein specified may be traced to the Court's assumption, specifically controverted by the admitted facts, that some legal relationship existed between Armour and the Yards Company, concerning the shipments here involved.

(1) *A new factual situation presented here, differing from that considered by this Court in previous cases.*

In our petition to this Honorable Court, at page 5, and in our brief filed in support thereof at page 22, we pointed out that in one particular, this case presented a factual and contractual situation never before considered by this Court, as far as known to us, in connection with livestock deliveries at the Chicago Public Stock Yards. Where, in the prior cases of *Adams v. Mills*, 286 U. S. 397, and *Atchison, T. & S. F. Ry.* v. *U. S.*, 295 U. S. 193, it appeared that the shipper had either commanded, or acquiesced in, the delivery of his shipment to and through the public stock yard located at the tariff station, "Union Stock Yards, Illinois";* in this case, the use of the public stock yard facilities was *forced upon* the shipper by the railroad, without his request for, or consent to, any such use of those public stock yard facilities.

Each railroad in this case could have *fully performed its contract of transportation,* and observed its common law duties, *without going near the public stock yard,* i. e., by delivery on railroad team tracks, through railroad owned pens, or on private sidings located at the same tariff station. Any such delivery would have been acceptable to the shipper.

*We shall hereinafter show that the same status obtained in the case of *Swift and Company* v. *Alton R. Co.*, 238 I. C. C. 179, in that the shipper there also demanded the public stock yard as the point of delivery.

The only case on factual fours with this case in this respect is that of *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128. There, as here, the use of the public stock yard as a delivering facility resulted solely from the adamantine insistence of the railroad to use the public yard rather than to make use of any other existing delivering facility, available at the same railroad station. There, and here, the sole cause of the use of the public stock yards as a delivering facility, was *railroad choice*.

We believe that the District and Circuit Courts have entirely overlooked the legal significance of this factual difference. As a result they have regarded the case just as though Armour, too, had directed these shipments to be sent to, and unloaded at, the public stock yard, and was here suing to recover the costs resulting from the railroads' obedience to its own orders in this respect. Such is not the case.

We believe that there is a marked difference, of great legal significance, between the contractual status and responsibility of shipper A, who (like the Hygrade Company in the *Atchison* case—See 295 U. S. 193, at 195, or like Swift and Company in the *Swift* case, 238 I. C. C. 179) *commands* a carrier to deliver his shipment to a public stock yards for unloading and delivery to him there; and shipper B, who *forbids* the railroad the right to make any such use of those yards, save at the railroad's own expense, and who offers to accept delivery at *any point the railroad may select*, within the limits of the same station.

We start with the principle laid down by this court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, at 136, to the effect that a railroad carrying livestock, has the *absolute right to select* the specific point within the boundaries of the destination station, at which it will make deliveries of livestock; and if it refrain from assessing, or allowing to be assessed, an extra charge for the use of

the facilities selected by it at such point, no shipper has cause for complaint.

It follows that when a shipper invades the carrier's right to designate or select the specific point of delivery at a given station, and names his own point of delivery, there may arise an implied contract to pay any extra costs that may result from his invasion of the railroad's right. But no such contractual obligation may be imputed when the shipper, not only fails to make any selection of any one of several available points of delivery within the station limits, but warns the carrier *not* to use one of such facilities unless the carrier is willing to absorb the extra cost arising from the use of that facility.

If, in addition to the mere use of the delivering facilities selected by the shipper, the shipper also contracts for stock yard service to be performed by the Yards Company, after railroad delivery is complete, there arises an additional contractual relation between the shipper and the Yards Company.

(2). *The Hygrade case* (295 U. S. 193) *involved a trilateral contractual relationship which does not exist in the case at bar.*

For purpose of contrast, let us analyze the exact contractual status of the Hygrade Company, the shipper in the *Atchison* case (295 U. S. 193) and particularly his relations with the Yards Company in that case.

First, Hygrade did *not* direct delivery of its shipments merely at *any* point,—team track, private track, industrial siding, or elsewhere—within the limits of the station "Union Stock Yards, Illinois." Hygrade closed the door to any such election by the railroad by *itself* choosing the exact point in those station limits, where it chose to accept delivery, viz., the Public Stock Yards.* By so lim-

* "To avoid that burden, the Hygrade Company elects, as did its predecessors, to have all livestock intended for slaughter at the plant shipped to the stockyards." (*Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193 at 195.)

iting the carrier's choice, Hygrade imposed the cost of unloading upon the railroad. Had Hygrade selected, or had the railroad been free to select, a team track, or private siding, at the same station, the railroad would have escaped that cost, as Hygrade itself would have been compelled to unload.

It would seem logical that if any increased expense arose by reason of the Hygrade Company's selection, that there would result an implied promise of the Hygrade Company to pay the extra cost of the facilities so used at its direction. This presumption would create an implied contractual relation between Hygrade and the owner of the facilities, the Yards Company, requiring Hygrade to pay the cost of that use.

But this was not all. After taking possession of its animals at the chosen point of tender, within the public stock yards, Hygrade did *not* passively wait to be shown how he might remove the animals from that point to a public street. Hygrade began to dictate* the route to be used; to demand the use of a specific overhead runway and tunnel, to the very door of its plant. As this Court pointed out, no railroad was obligated to buy Hygrade a privately owned means of access to its plant. Hence, there was created a second implied promise to pay the owner of these private facilities for their use.

Summarizing, we have the following contractual relationships between Hygrade, the railroad, and the Yards Company, appearing in the *Atchison* case (295 U. S. 193):

1. Hygrade and railroad. A contract of transportation and delivery to a specific point, within the destination station limits, selected by Hygrade, viz., the public stock yards.

* "Consignee also sought free use of the Yards Company's properties including the overhead runway to take its animals from holding pens as well as from unloading pens to its plants." (*Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193 at 200.)

2. Railroad and Yards Company. A tariff contract to furnish the facilities and services necessary to unload the animals into suitable pens.

3. Hygrade and Yards Company.

(a) An implied contract to pay any excess in cost, arising from Hygrade's invasion of the carriers right to select the point of delivery, by Hygrade's selection of the public stock yards as the point of delivery, if any excess cost resulted.

(b) An implied contract to pay for the use of the overhead viaduct, tunnel, runways, etc., specifically demanded by Hygrade, as its preferred route from the point of delivery to its plant.

This is in truth a situation of *trilateral contractual relationships*, a "tri-party relation" as the Circuit Court twice styles it. (Rec. 83, 84.)

If the complaint here be examined, the factual differences between this case and the *Atchison* case (295 U. S. 193) will be instantly apparent. One of the three sides of the "tri-party relation" existing there, is *non-existant here*, for there is here *no* express or implied contractual relation existing between Armour and the Yards Company whatsoever.

We have a contract between Armour and the railroad. (Rec. 9.) But that contract merely covers transportation to *any* delivery point in the wide area* comprising the station "Union Stock Yards, Illinois," that the railroad might select. There was no selection by Armour of team track, private track, public stock yards or elsewhere, as the delivery point. On the contrary Armour warned the railroad *not* to use the public stock yards, save at the railroad's *own* expense. (Rec. 36.) The sole demand made by Armour was

* "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits'. Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on siding of spur-tracks owned by an industry." (*United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 at 409.)

for a delivery in *some* pens owned or controlled *by the railroad.* (Rec. 33.) The situs of those pens was left entirely open for establishment by the railroad. It follows, there is here no promise to be imputed to Armour, to pay any extra expense that might arise from the railroad's selection of the public stock yards as the point of delivery. Armour made no selection of a specific delivery point such as Hygrade did.

Nor did Armour, after taking possession of the animals, attempt to dictate or control the route and means of removal, as did Hygrade. (Rec. 16.)

All that Armour demanded was that the railroad provide a means of ingress and egress to *whatever point the railroad chose as the delivering point* at this station. If the railroad chose Armour's private siding, the question was moot. If the railroad chose to use the same team track on which it was delivering a third of the other direct shipments to Chicago packers,* the demand was for ingress from, egress to, and a free delivery at that team track. Or if the railroad elected to provide and use pens of its own, or the facilities of the public stock yards, the demand was for ingress and egress to and from the chosen pens, wherever they were. Any demand for delivery specifically at the public yards, and any demand for any stock yard service on these animals is specifically negated by the complaint. (Rec. 37, 38.)

Where in the *Atchison* case (295 U. S. 193) there were two separate and distinct contractual relationships between the consignee and the Yards Company, here there is *none.* The only relationships existing in this case, are: First, the relation of shipper and carrier between Armour and the railroad. The Yards Company not a party to that contract. That contract was *capable of complete perform-*

* "More than one-third of the direct shipments of livestock arriving at Chicago is unloaded at points other than the Union Stock Yards". (*Swift & Co. v. Alton Railroad Co.*, 238 I. C. C. 179 at 189.) The decision is appended to the brief of certain respondents in opposition to the petition for certiorari filed herein.

ance by the railroad without any use of Yard Company's property whatever, i. e., by electing team track delivery, private siding delivery, or by the construction or leasing of carrier owned pens within the station limits, at a point removed from the public stock yards.

Second, there was the relation of principal and agent, or employer and employee, between the railroad and the Yards Company. Armour bore no relation and was not a party to that contract. It was not made at Armour's request or for its especial benefit. The railroad, free from any direction or suggestion or attempted control by Armour (Rec. 10), chose to employ the Yards Company, rather than build pens of its own, or tender delivery elsewhere. At the time of that choice the animals were still in railroad cars on railroad tracks, and *no tender of any delivery had ever been made to Armour,* up to the time the railroad made its election to hire the Yards Company. (Rec. 10.) Not until after the railroad's contract of employment with the Yards Company had been made and performed, did Armour receive any notice that its shipments had arrived. (Rec. 10.)

Thus Armour was not a party to the contract whereunder the Yards Company was hired by the railroad, *any more than it was a party to the railroad's contract with the engineer who brought the car to its destination.* By notice previously given (Rec. 12, 36) it had completely forestalled any possibility of an implied obligation to pay for the facilities of the Yards Company, by directing the railroad *not* to deliver to the Yards Company, save at its own expense (Rec. 36), and by directing the Yards Company to render no services for Armour upon said shipments. (Rec. 37-38.)

Thus, there is no scintilla of factual support for the Circuit Court's assumption that the same "tri-party relation," between shipper, railroad and Yards Company, existed here, such as "came into existence" in 1865 (Rec. 83); such as existed in the *Atchison* case (295 U. S. 193)

and in the *Adams* case (286 U. S. 397). On the contrary the allegations above cited affirmatively establish that there was no contractual relationship between Armour and the Yards Company here, and consequently could be no such "tri-party relationship," as the Circuit Court twice describes.

(3) *The Swift case* (238 I. C. C. 179) *involved a trilateral contractual relationship which does not exist in the case at bar.*

That same factual difference also distinguishes the *Swift* case (238 I. C. C. 179) from the case at bar. At page 189 of the decision, speaking of the Swift shipments, the Commission said:

> "It appears therefore that direct shipments of livestock are unloaded at the Union Stock Yards, *only when complainant elects to take delivery there*".*

Thus the contractual status of the shipper in the *Swift* and *Atchison* cases was the same. Each had invaded the railroad's right of selection of the point within the station limits at which delivery was to be made. The public yards were used because of some act or direction of the shippers, which created a "tri-party relation". In the case at bar no such "election to take delivery there" was made by Armour. The election to use the public yards in the case at bar was solely the election of the railroad, to use those facilities rather than to provide pens of its own, or tender the same delivery on team tracks it was currently affording to other shipments.

It may seem that we have unduly stressed this erroneous factual assumption made by the District and Circuit Courts. But we believe that every material error of the

* As a matter of information, in a bill filed in the District Court October 7, 1940 by Swift and Company (under the theory of the decision of this Court in *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125) Swift and Company have assailed many findings of the Commission in this decision, asserting error. But the finding above quoted is *not assailed* in that bill as inaccurate or unsupported by evidence.

courts below is rooted in this misconception of the rights, remedies and liabilities of the parties. We shall now attempt to justify our belief in this respect.

(4) *The finding that the Yards Company is a necessary party defendant, is grounded upon a misconception of the contractual status of that company in this case.*

We have shown that the railroad could have completely performed its contract with the plaintiff without going near the public stockyards. We have shown that the complaint negatives any possible imputation of a contractual status between Armour and the Yards Company. We have shown that no question is raised to the measure or reasonableness of the Yards Company's charge, or to its right to make a charge for the use made of its property.

The language of the District Court displays a complete disregard of these facts. The opinion states that Armour asks a court order "compelling defendants to provide plaintiff suitable *ingress to the Yards of the Stock Yards Company* and egress from the Yards". The court inquires "How the Court, not having jurisdiction of the Stock Yards Company could enforce such an order, Plaintiff does not explain". (Rec. 54, 55.)

Our answer is, the District Court has imputed an objective we do *not* seek. No use of the Yards Company's property, no ingress to or egress from that property is required to satisfy Plaintiff's demand. The prayer of the complaint was not directed at any use of the Yards Company's property. It merely asked an order directing delivery "at the unloading pens *of the Defendant*" (not of the Yards Company) "or at such other point as same may be tendered * * * free from any lien * * * of the Stock Yards Company, *or* of any other person * * *." (Rec. 21.)

Thus the error of the District Court lies in stating the case* and the relief sought, not in its decision. The decision is of a moot question.

(5) *The Circuit Court's finding of "overcharge" in violation of the Interstate Commerce Act, is grounded upon the same misconception of fact and of contractual status.*

Likewise the Circuit Court's finding that our suit is for "overcharge" connotes the impression that some contractual status existed between Armour and the Yards

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* Other erroneous statements of the District Court are as follows:

"Defendants' station" (Union Stock Yards, Illinois) "is *not* located on the property of the defendants or any of them * * *." (Rec. 51.)

"Plaintiff has long known that the Union Stock Yards Station of defendants was on the property of * * * the Yards Company." (Rec. 53.)

(There is no allegation in the complaint warranting this assumption that defendants tariff station was exactly coextensive with the public yards.)

"About ten days prior to the 25th of May, 1933 Plaintiff notified the defendants * * * that it did not desire the services of that" (the Yards) "Company (*other than the service of unloading* * * *)." (Rec. 52.)

(No allegation of the complaint warrants this implication that Plaintiff desired unloading, which it could only receive free at the public stock yards. The notice named refers only to "pens of the carriers". (Rec. 33.) Whether unloading was to be received or not depended upon what pens the carriers chose to make theirs.)

"* * * and demanded that the defendants * * * permit it" (Armour) "to remove it" (livestock) "from the Stock Yards * * *." (Rec. 52.)

(We have shown the utter lack of support for this statement.)

"It now demands * * * that it be given the right of ingress to and egress from the *property of the Stock Yards Company* without * * * payment to that Company." (Rec. 53.)

(That demand is only conditioned upon the prior free choice and election of the railroad to tender delivery there and to refuse to tender it elsewhere.)

"* * * plaintiff * * * are now consigning their stock to the Union Stock Yards *station*. Knowing * * * *it could not be removed* * * * *without use of facilities owned by the Stock Yards Company*." (Rec. 54.) (An wholly incorrect statement.)

"Plaintiff prays * * * injunction compelling defendants to provide suitable ingress *to the yards of the Stock Yards Company*, and egress from the yards, * * * without payment of any charge." (Rec. 54-55.)

(The prayer is for "suitable ingress for Plaintiff to the point at which delivery of livestock is tendered," (not the public stock yards) "and proper * * * egress for removal of its livestock from the unloading pens *of the defendants*," (not of the Yards Company), "*OR* from such other point in said station where delivery *may be* tendered at the Union Stock Yards, Chicago, Illinois, without the payment of any charge * * * to the Stock Yards Company, *or to any* other person * * * save and except the said rates for transportation." (Rec. 21.)

The prayer clearly covers any point the railroad may select, *including the* stock yards.

The alternative is for egress "from the pens of the Defendants *or* the Union Stock Yards.")

Company. No railroad collected anything but its tariff rate. (Rec. 9.) The payment made to the Yards Company was made in connection with *no contract for transportation.* Hence that payment could not be an "overcharge" forbidden by Section 6(7) of the Interstate Commerce Act. The payment would have been the same had the carrier chosen to deliver the shipment to Swift & Co. Would a payment to Swift for a similar unauthorized use of its property in effecting delivery to Armour be an "overcharge"?

Thus the error of the Court is in assuming the contractual status of shipper and carrier, essential to overcharge, to exist here between the Yards Company and Armour. The Circuit Court made no mention of there being any other violation of the Commerce Act by any carrier, asserted in the complaint.

With the disappearance of this sole violation of the Commerce Act the possibility of Commission jurisdiction completely disappears, and Section 22 of the Commerce Act leaves the case where it is,—in the courts.

This subject is further discussed at pages 11-21 of our brief in support of our original petition.

(6) *The Courts' findings that administrative action is necessary to determine the existence of overcharge, reflects the same misconception of fact and of contractual status.*

The Circuit Court describes five factual considerations (which it holds to be administrative in nature), which it holds must be considered and decided before the existence or non-existence of this single violation of the Interstate Commerce Act, viz., "overcharge" can be determined.

These are (Rec. 84):

The history of the Chicago Stockyards.
The use of these yards as the carrier's usual place of delivery.

The history of the yardage charge.
The tri-party relation.
Other facts of transportation incidental to rate making.

In our primary brief (pages 19-21) we established that overcharge, forbidden by the Act, is the mere difference between the lawful applicable tariff charge and the larger amount paid to the contracting railroad. Certainly the *tariff published rate* applicable cannot be different depending upon what the evidence may show concerning the "history of the yardage charges," etc. Nor can the number of dollars paid by Armour be altered, depending on the "history of the Chicago Stockyards" or of its charges, etc. Whatever those historical facts be, the tariff rate, and the amount paid remain constant.

The total irrelevance of any of these alleged administrative facts is made more obvious by recalling that Armour made no requirement, in fact forbade, any use of the Yards property for its account, and offered to take delivery anywhere at this station. The railroad could have made full performance without going near the public yards.

Realization of this fact creates this dilemma:

Either the Circuit Court has erroneously assumed that some contractual status—some relation of shipper and carrier essential to "overcharge,"—existed between Armour and the Yards Company, to which these facts related; or, the Circuit Court has in effect ruled that a carrier, by its willful and disobedient act, may *compel* a shipper to contract and pay for the use of terminal facilities or services, which it does not need, nor desire.

It is obvious, that had the railroad's election been different; had the railroad elected to tender delivery on team tracks, as they did as to one-third of the direct shipments received at Chicago, or on Armour's private siding, or at newly constructed pens of their own, the "history of" the

public yards; the "history" of the Stock Yards charges; the "tri-party relation" and the other administrative considerations named by the Circuit Court *would have been wholly moot to any issue in the case.*

Can those facts be of greater significance when they appear solely because of the willful act of a railroad, in disregard of its contracts and common-law duties? Can a railroad make the "history of the Chicago Stockyards" relevant; *create* such administrative questions; and thereby *deprive* the courts of jurisdiction by its own willful and disobedient act, in delivering Armour's property to a third person not entitled to receive it, and not an agent of Armour, and at a point not requested or consented to by Armour?

(7) *The same misconception of fact and contractual status constitutes the basis for the Circuit Court's decision that the Commission's decision in Swift & Co. vs. Alton Railroad,* 238 I. C. C. 179, *"stands in Armour's way".*

In addition to discussing this point we shall divert to explain a most unfair implication cast by page 17 of respondents' original brief.

Since the respondents have incorporated the decision of the Commission in *Swift and Company* v. *Alton Railroad,* 238 I. C. C. 179, into this record; and since Armour is shown to have been a party to that proceeding, we believe we should point out that Armour was not seeking dual relief for the same wrong, from both the courts and the Commission, a course prohibited by Section 9 of the Interstate Commerce Act.

After this suit was filed* in the State Court, the complaint of Swift and Company to the Commission was set

* Referring to Armour's petition of intervention in the *Swift* case, the Commission said (page 180): "In this petition it" (Armour) "stated that it *had* instituted a proceeding in the State Court involving substantially the same issues and praying for similar relief."

for hearing. As the Commission's decision shows, that case, like the *Atchison* case (295 U. S. 193), involved shipments "unloaded at the Union Stock Yards *only when complainant elects to take delivery there*".

It is significant to note that Armour's petition stated that it *had* prayed relief, not from the Commission, but from the courts. The description of the petition by the Commission, negativing any prayer for *any relief from the Commission* in Armour's petition of intervention, was a correct reflection of specific statements made in that petition.

It was conceivable that, in the future, Armour might have an occasional shipment which it too would "elect to take delivery there"; *i. e.*, at the public yards, for the purpose of having the animals weighed, or, if Armour's own pens were full, perhaps stored and otherwise served by the Stock Yards Company, after the carriers had completed their contract of transportation by delivering to the person to whom Armour had directed delivery in the case assumed.

If the evidence shall show any such shipment made after the commencement of the Swift hearing, it is obvious, that as to a shipment so ordered into the public yards by Armour, the decision in the Swift case "stands in Armour's way" (Rec. 92). But it is wholly a *non-sequitur* to say that the same decision also "stands in Armour's way" as to a shipment *never* directed into the public stockyards by Armour, and taken there against its will and without its consent, as the Circuit Court has held.

In substance, Armour may be assumed to have been interested in the question raised by the Swift complaint, of the reasonableness of the practices of the carriers, on any occasional shipments Armour might thereafter order into the public stockyards, to be served by the Stock Yards

Company, after transportation had been completed by delivery to the person to whom Armour directed delivery.

But until evidence shall show that Armour here attempts to recover damages on some shipment which it *did* order into the public yards, that case cannot concern nor affect the shipments here involved. Armour did *not* order these shipments into the public yards. They were taken there without its consent, by the willful and disobedient act of the railroad.

(8) *The same misconception of fact and of contractual status are probably responsible for the failure of the Circuit Court to note that the Galveston* (223 U. S. 481) *and Covington* (139 U. S. 128) *cases are on factual fours with the case at bar, and are therefore controlling.*

The Circuit Court's disregard of two decision of this Honorable Court, heavily stressed by petitioner in its presentation to that court, can only be explained by this same misconception of fact and contractual status.

Galveston, Harrisburgh and San Antonio v. *Wallace*, 223 U. S. 481, was a proceeding arising a few years after the decisions of this Court in the *Abilene* (204 U. S. 426), *Robinson* (222 U. S. 506) and *Pitcairn* (215 U. S. 481) cases. The plaintiff in that case sought to recover the value of property shipped by the defendant railroad to a destination on a connecting line, and never delivered. Plaintiff proceeded in the State Court, relying upon the then new Carmack Amendment to the Commerce Act (Sec. 20(11) of the Commerce Act), for its right to sue the originating railroad, for loss or damage occurring on a connecting line.

The railroad (as does the railroad here) attacked the jurisdiction of the Court on the theory, since plaintiff's action was grounded on the Commerce Act, primary resort to the Commerce Commission must be had and urged the

doctrine of the *Abilene* (204 U. S. 426), *Robinson* (222 U. S. 506), and *Pitcairn* (215 U. S. 481) cases.

The Supreme Court disposed of this contention in one brief statement at page 490 (emphasis supplied):

> "But damage caused by failure to deliver goods *is in no way traceable to a violation of the statute*" (the Commerce Act) "and is not therefore within the provisions of Sections 8 and 9 of that Act" (restricting remedies to the Commission or the Federal Courts, to the exclusion of the State Courts).

The damages sought here are damages "caused by failure to deliver goods". Whether the misdelivery had been made to Swift and Company, to a Livestock Commission firm, or to the Yards Company, the damage remains the same, being the cost to Armour, of recovering that possession of its property, which it was entitled to receive from the railroads without cost.

The railroads have sought to differentiate this case from the case at bar by contending that here "there is no allegation that the livestock were lost".

Nor was there any such allegation or proof in the Galveston case (223 U. S. 481). We quote from the opinion of this Court (223 U. S. at 489):

> "Neither the pleadings nor proof showed what this company did with the mohair, nor the cause of its nondelivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification."

So far as the decision goes, the mohair involved in the *Galveston* case might have been in the hands of a warehouse Company, which, like the Yards Company here, was demanding charges which the shipper refused to pay. Many other assumptions of similarity might be made.

But in the last analysis, in both this case, and in the *Galveston* case, the damages sought resulted from the rail-

road's *failure to deliver to the person entitled to the property.* Only the measure of damages differs. In the *Galveston* case, the measure of damages was the full value of the property misdelivered. Here it is the full cost of recovering the property misdelivered. And this Court has said that "damage caused by failure to deliver goods is in no way traceable to a violation of the statute" (the Commerce Act). Therefore the Commerce Commission could have no jurisdiction of the cause.

The distortion of this claim for damages for misdelivery, into an "overcharge" by the Circuit Court could, we believe, only be predicated upon a total misconception of the contractual status of the parties involved in the transaction.

We have previously (page 20) commented upon the identity in the contractual status of the parties here, and in the *Covington* case (139 U. S. 128), and will not repeat those comments here.

(9) *The same misconception of fact and of remedy sought underlies the decision of the District Court that the Federally appointed trustee defendants could not be sued here without consent of their appointing courts.*

The Circuit Court affirmed without comment, the decision of the District Court to the effect that the trustee-receiver defendants could not be sued here without the consent of the Federal Courts appointing them.

Sections 124, 125, Title 28, U. S. C. A., pages 173 and 212 (Sections 65 and 66 of the Judicial Code), read as follows:

> "Section 124. (Judicial Code, section 65.) *Management of property by receivers.* Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property

shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

"Section 125. (Judicial Code, section 66.) *Suits against receiver.* Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

The District Court refused to apply these sections in the case at bar, and held that it was incumbent upon Armour to first obtain the consent of the appointing Federal courts, to the maintenance of this suit. (Rec. 55.)

The legal error thus committed by the District Court is worthy of passing comment. The first case cited in support of the Court's ruling is *Barton* v. *Barbour*, 104 U. S. 126.

That decision was made in 1881.

The above statutes were passed in 1887.

The repeal of the decision in *Barton* v. *Barbour*, by the subsequent enactment of the statute, was noted by this Court in *Texas & Pac. Ry.* v. *Cox*, 145 U. S. 593 at 601, and in *McNulta* v. *Lochridge*, 141 U. S. 328, at 330.*

Briefly the cases upon this point divide very clearly into two classes. Whenever the *right to possession* or *right to control* or operate the trust estate is affected by the proceeding; or where the priority of the asserted claim is involved, the consent of the appointing court must be obtained. But where the suit merely seeks to establish a *liability* for wrongful acts, that consent is not a prerequisite to the prosecution of the suit.

* (See also *Central Trust Co.* v. *Wheeling & L. E. R. R. Co.*, 189 Fed. 82 at 84.)

Thus in *Ex Parte Baldwin*, 291 U. S. 610, the collateral suit was to wrest actual possession and control of a portion of the receivership estate from the receiver and from the Court.

In *Merryweather* v. *United States*, 12 Fed. (2d) 407, the government sought to assert collaterally a priority of its claim. In each case it was held that prior consent of the appointing court must be had and obtained. But suits for the receiver's violation of law, contract, or for negligence in operation fall within the purview of the statute above quoted. The dividing line is clearly established in the following decisions: (*Erb* v. *Morasch*, 177 U. S. 584 at 585; *Willcox* v. *Jones*, 177 Fed. 870 at 872; *Central Trust Co.* v. *St. Louis A. & T. Ry. Co.*, 41 Fed. 551 at 554-5; *Central Trust Co. of N. Y.* v. *Wheeling & L. E.*, 189 Fed. 82 at 84; *Ex Parte Tyler*, 149 U. S. 164 at 181.)

Summarizing, any court otherwise having jurisdiction, may adjudicate and fix the measure of the responsibility of a Federally appointed trustee without consent of the appointing court. But the enforcement of the collection of the amount so fixed, or any question of priority of the resulting claim, or any interference with the possession or control of property thus in *custodia legis*, can only be had at the hands of the appointing court.

The District Court's conception of this suit as an attempt to interfere with the possession, operation or control of the property in possession of these Federal trustees and receivers, in our opinion, can only be explained on the theory that the District Court wholly misconceived the basic cause of action here asserted, not only with respect to the facts and the contractual status of the parties, but in a broader way, to which subject we shall next advert.

This suit is not a suit for injunction, with incidental damage requested. It is a simple suit for damages, for violation of law and contract. The injunctive relief prayed is directed solely at the continuance of such contractual and legal violations as may be found to have existed in the past.

It is significant to us that while the District Court's opinion makes but casual reference to the fact that Armour seeks damages for breach of contract or common law duty by the railroad, the injunctive relief is stressed throughout. (Rec. 46-55.) That Court's statement of the case (Rec. 46, 47) makes it appear that some affirmative order is requested against the trustee and receiver defendants, which would interfere with their management of the respective estates in their control.*

We plead guilty to contribution to this misleading statement, because of the order in which the requested relief is stated in the prayer of the complaint. But a reading of the entire complaint reveals that the foundation for the legal and equitable relief, is a repeated breach of contracts of the same terms, and of repeated disregard of the same common carrier common law duties.

Because these contracts and duties have been broken and disregarded in the past, damages are prayed. Because of the threat that the breaches and disregard will be continued in the future, with the resulting multiplicity of suits, an order is prayed asking that these trustees and receivers be ordered to *obey the law*, in their operation of these properties.

The damages prayed are wholly independent of the equitable relief requested. This Court might decide, that the railroads, trustees and receivers had damaged Armour by their past conduct, yet fail to find grounds for the equitable relief prayed. The finding of breach of contract and of common law duty in the past, is a condition precedent to the equitable relief prayed, in that *if* the railroads' conduct in the past was lawful, there is nothing to enjoin for the future.

Or, this Court might conclude that while the damage inflicted by the actions of these trustees in the past could be

* See footnote, page 28, *supra*.

reduced to judgment in this Court, that the equitable relief of injunction, merely requiring them in the future to "manage and operate" the property in their possession "according to the requirements of the valid law of the state in which such property shall be situated," as required by Section 124 of Title 28 U. S. C. A. (quoted at page 35 *supra*), was not a form of relief to which Armour was entitled at the hands of this Court.

In addition to the erroneous concept, appearing throughout the opinion of the District Court, that Armour demanded some free use of the private property of the Yards Company,* there is added this concept that the suit in some way sought to interfere with the free operation and control of property in *custodia legis*.

Such interference as Armour seeks to enforce upon these trustees is the *interference of the law itself*. It is the law, not the injunction, that places upon them the duty of delivering property they transport, to the right person. All that was here sought by way of injunction, was an order that these trustees *obey the law applicable to their operations*, as Section 124, Title 48, U. S. C. A. requires that they do.

When the controlling issues of fact raised by the complaint, and the involved principles of law are correctly comprehended, it appears that there is no question of fact here, requiring the peculiar qualifications of the Commission for decision, nor any question of any law presented which has been committed by Congress to the exclusive jurisdiction of the Commerce Commission.

As will appear from the briefs of the parties herein, any Court hearing this case on the merits, will be called upon to make a finding based on the evidence on this question:

> Did Armour direct these shipments into the public stockyards, or did the carriers take them there of their own volition?

* See footnote, page 28, *supra*.

The Court's finding will be supported by evidence of the most ordinary type,—letters, verbal instructions, telephone conversations, bills of lading, written notices, and other ordinary evidence, requiring no technical knowledge or experienced judgment of the type ordinarily attributed to the Commission. It will be evidence of the type ordinarily considered by any court every day.

If that finding of fact be that Armour did not direct the use of the public yards, there will then arise the question of the capacity in which the Yards Company came into possession of the livestock, and the capacity in which it refused to surrender possession of them, until Armour paid toll.

The evidence will establish grounds for one of two findings on fact on this point either:

(1) That the railroad's delivery to the Yards Company was the delivery of a principal to an agent, for the specific purpose of completing the railroad's contract with Armour, or

(2) That the railroad's delivery to the Yards Company was a final delivery disassociated from any contract of agency.

Either of these findings, *i. e.*, whether the relation of principal and agent existed or not, are findings which any court is regularly called upon to make, from facts such as would be involved here. No experienced judgment in technical matters is required to consider the evidence and conclude whether or not the relation of principal and agent existed between railroad and Yards Company or not.

Depending upon which of the foregoing findings be made, one or another conclusion of law will follow. Precedent to a discussion of that legal alternative, we quote those portions of Sections 89 and 90, Title 49, U. S. Code Annotated, which may be involved in one of these alternatives.

"Section 89. Delivery; when justified.

A carrier is justified, subject to the provisions of

the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, * * *."

"Section 90. Liability for delivery to person not entitled thereto.

Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods."

Here, Armour was clearly the "consignee" named in the bill of lading (Rec. 9), and the "person lawfully entitled to the possession of the goods" within the meaning of Section 89 above quoted. Armour was also the one having "right of property or possession in the goods" as defined in Section 90 above quoted.

If the legal conclusion be that the Yards Company was the employed agent of the railroad, the status of the Yards Company toward Armour was the same as that of the engineer who pulled the train, or the agent who signed the bill of lading. Armour had no contract with any of them.

If we assume the agency relation existed, then the refusal of the Yards Company to deliver to Armour on demand, or to make any delivery save on payment of ransom, which Armour had never agreed to pay, *was the refusal and demand of the railroad itself.* The railroad is directly responsible, to Armour, just as it is for negligence of its engineers.

> "If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees." (*Covington Stock Yards* v. *Keith*, 139 U. S. 128 at 135-6.)

But if we disregard the agency, and regard the refusal of the Yards Company to deliver, as the act of an independent person, then the Yards Company came clearly within the category described in Section 90 of Title 48 (above quoted) and was "one who is not lawfully entitled to the possession" of the livestock in question. The delivery by the railroad to the Yards Company was after Armour, "having a right of property or possession of the goods" had specifically "requested" the railroad "not to make." (Rec. 36-37.) It was a delivery when the railroad "Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods." (Rec. 36-37.)

Summarizing:

If the fact be that the railroad and not Armour, hired the Yards Company in this matter, and if the railroad seeks to justify its delivery to the Yards Company, as the rightful employment of an agent, to do its work, then the refusal of the Yards Company, and the demands of the Yards Company, were the railroad's own refusal and demand, just as the negligence of its engineer is the railroad's negligence.

If the railroad denies the agency of the Yards Company, so as to escape the consequences of the refusal of, and the

demand upon Armour made by the Yards Company, then the railroad's delivery to the Yards Company, was a delivery wholly in contravention of the Sections of the Bills of Lading Act above quoted, and the railroad is "liable" to Armour the person "having a right of property or possession in the goods."

Neither of the ultimate questions involved in this dilemma are questions presenting any administrative difficulties. No question of reasonableness, or preference, or of "the history of the Chicago stockyards" or of the yardage charges, exists. No questions requiring technical skill or informed judgment appear. The Commission is without exclusive jurisdiction to determine the basic legal question whether the railroad employed the Yards Company as an agent, or not. If it did, the Commission is without power to change the responsibility which the refusal to deliver and the demands of the Yards Company, *imposed upon the railroad as a matter of law.*

On the other hand, if the Yards Company were not possessed of Armour's goods as carrier's agent, the responsibility of the railroad to Armour is definite and certain under the Bills of Lading Act, and the Commission is without power to adjudicate violations of that Act, or to award damages for its violation.

Conclusion.

We quote one sentence from the complaint which in our opinion conclusively settles the first issue of fact, on a motion to dismiss (emphasis supplied):

> "That the Plaintiff had at no time prior to receipt of such notice,* as to any of such shipments, exercised *any* dominion or control, or given *any* direction *either* to the Defendant transporting any such shipment, *or* to Defendants' agent, the said Stock Yards Company,

*i. e., notice that the shipment had arrived.

as to the *time or manner of unloading*, the *platform at which*, or *the chutes or pens through or into which the said livestock was to be unloaded*, or held pending tender of delivery or in *any way directed or controlled*, or *attempted* to direct or control *either* the Defendants, *or* any of them, *or* the said Stock Yards Company, in respect to *unloading*, yarding, driving, or handling of *any* shipment of said livestock, nor had any tender of any of said shipments been theretofore made to Plaintiff, *either* by the Defendant who transported the same to Union Stock Yards, *or* by the Stock Yards Company." (Rec. 10.)

In the face of this plain allegation, the contention of the railroads, grounded as it is upon a *confusion of their own tariff name of their own railroad station* "Union Stock Yards, Illinois," with a trade name used for the public yards "Union Stock Yards," and an attempt to interchange one for the other, as needs require, seems to us to be weak indeed.

If any confusion results from the similarity of the railroad name of its station, to the popular name of the public stock yards, that confusion can not be laid at Armour's door. And if such confusion does result, we believe the Court should accept the interpretation of counsel who wrote the complaint, rather than of counsel whose clients are solely responsible for the confusion.

The Circuit Courts of Appeal have recently considered similar situations, and made the following pronouncements (emphasis supplied):

"We are therefore *required* to deal with the broad question whether the facts alleged in the amended petition, *viewed in the light most favorable to petitioner*, are insufficient to support its claim for a refund." (*Grain Belt Co.* v. *Comm'r. Int. Rev.*, 109 Fed. (2d) 490, at 492.)

"* * * We think there is no justification for discussing a complaint for insufficiency of statement, except where it appears *to a certainty*, that the plaintiff would be entitled to *no* relief under *any state* of facts

which could be proved in support of the claim." (*Leimer* v. *State Mut. Life Ins. Assoc.*, 108 Fed. (2d) 302, at 306.)

Under a correct conception of the facts, it seems obvious to us that this case is controlled by the decisions of this Court in:

Covington Stock Yards Co. v. *Keith*, (139 U. S. 128), cited as the law of the land by this Court in its decision not quite a year old, in *Union Stock Yards & T. Co.* v. *United States*, 308 U. S. 213.

Erie Railroad Co. v. *Shuart*, 250 U. S. 465, cited as the law of the land in the same recent decision, and

Galveston, H. & S. A. R. R. v. *Wallace*, 223 U. S. 481.

Respectfully submitted,

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APPENDIX A.

Sec. 9, Title 49, U. S. C. A.:

"Remedies of persons damaged; election; witnesses. Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable *under the provisions of this chapter*, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Sec. 22, Title 49, U. S. C. A.:

"* * * nothing in this chapter contained shall in any way *abridge or alter the remedies now existing at common law or by statute*, but the provisions of this chapter are in addition to such remedies; * * *."

Sec. 12(1), Title 49, U. S. C. A.:

"(1) Authority, duties, and proceedings of commission; witnesses.

"The commission created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have

the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is authorized and required *to execute and enforce the provisions of this chapter;* and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the *enforcement of the provisions of this chapter* and for the punishment *of all violations thereof,* and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and *for the purposes of this chapter* the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

Sec. 13(1), Title 49, U. S. C. A.:

"Complaints to and investigations by commission.—(1) Complaint to commission of violation of law by carrier; reparation; investigation. Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything *done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof,* may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be

any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Sec. 15(1), Title 49, U. S. C. A.:

"(1) Commission empowered to determine and prescribe rates, classifications, etc. Whenever, after full hearing, upon a complaint made *as provided in section 13 of this chapter,* or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the *commission shall be of opinion that any* individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, *or otherwise in violation of any of the provisions of this chapter,* the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Sec. 16(1), Title 49, U. S. C. A.:

"(1) Orders by commission for payment of damages. If, after hearing on a complaint *made as provided in section 13 of this chapter*, the commission shall determine that any party complainant is entitled to an award of damages under *the provisions of this chapter for a violation thereof*, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 293

ARMOUR AND COMPANY, a Corporation,

Petitioner,

against

THE ALTON RAILROAD COMPANY, a Corporation, *et al.,*

Respondents.

REPLY BRIEF OF PETITIONER

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No. 293

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Respondents.

REPLY BRIEF OF PETITIONER

INTRODUCTION.

Under the legal principles heretofore observed by this court, there are no facts before this court at this time, save those stated in the complaint. Defendants' motion to dismiss raises the single question of whether those facts, and *those facts alone,* state a cause of action of which the courts of law have original jurisdiction.

We are here confronted with a defendants' brief which is replete with fragmentary quotations from briefs and from records in other cases, which are not before this court; with fragmentary statements made by plaintiff's counsel in other cases; with gratuitous unsupported and wholly "off-the-record" statements of counsel, and with other *ex parte facts,* none of which have any bearing

upon this single question, which is the only question before this court for decision.

Categorically, we deny that we have made any statements to the Commission or to the lower courts in any way inconsistent with those made here; we deny that the facts upon which the *Swift* case was decided are similar to those alleged in the complaint; we deny that there is any existing contract between Armour and the Yards Company; we deny that the freight rate paid applied "only" to the public stock yards; and we deny every other *ex parte* facts stated by counsel in defendants' brief.

Most of these denials we could substantiate now, if we cared to stultify ourselves by also departing from the record, merely to complete and extend the fragmentary "off-the-record" quotations which counsel have brought into their brief. Except within the field permitted by judicial notice we shall not do so, for, if all of them were true, the court would not better be able to pass upon the sole question before it: Do the facts alleged in the complaint state a cause of action of which a court of law may take cognizance?

If we have blown hot and cold in other records, and in other briefs, our statements may be offered in evidence at a trial *on the merits,* as admissions against interest, or by way of impeachment, and unless we rebut or explain them we shall fail. If the facts upon which the Commission decided the *Swift* case *are* on all fours with the facts proven here, no doubt the Commission's decision of that case will control this one. But that must be developed at a hearing *on the merits,* and not assumed here. If the Commission must fix the limits of the station "Union Stock Yards, Illinois" because the carriers' tariffs do not, that must arise after it has been developed at a hearing on the merits, that

the tariffs of the carriers do not fix those limits; if there be some contract, made in 1892, under which Armour is estopped from asserting the rights here claimed, that is a matter to be determined at a hearing on the merits, and not assumed here.

Counsel's reference to these, and many other points, are *not* grounded upon *any allegations found in the complaint* which is the only factual record now before this court. The rebuttal of the innuendoes and implications created by those fragmentary quotations, and unsupported assertions, must also be found outside the record which is before this court.

At the proper time, at a hearing on the merits, we shall gladly meet these unsupported assertions and "off-the-record" references, confident in our ability to refute or explain them. We will limit ourselves here, to such rebuttal of them as is *found in this record,* and as may be within the field of judicial notice.

We here record our protest at being placed in the position where we must either defend questions going to the merits, on *seven days' notice,* by going far afield from this record, or stand silent, leaving unchallenged, disparaging innuendoes and implications, which arise from these selected and fragmentary quotations, and these unsupported *ex parte* statements of counsel. We are confident that this court cannot be led into any fallacious consideration of issues not before it, particularly when but one side of the extraneous controversy is presented.

We are uncertain as to what constitutes the record in this case. Appended to defendants' brief are certain documents taken from the record in the *Swift* case. They were not of record in the Circuit Court of Appeals. They were not of record in the District Court, save as supplementing defendants' b ef in that court. They

were not certified by *any* clerk of *any* court until December 17, 1940. No notice of any intention to enlarge the record was ever received by us, until the brief was served upon us January 6, 1941.

If that matter *is* a part of the record here, we call attention of the court to these facts:

All of the documents and statements were filed and made *after* this suit was begun.

We attempted to make a full explanation of the reasons why we alleged no violation of the Commerce Act in our intervention; of the differences between the court and the Commission proceedings and of other matters, and we were summarily stopped by the sustained objection of one of the counsel whose name appears upon defendants' brief in this court.

ARGUMENT.

Our reply to defendants' brief will discuss, *seriatim*, the five principal divisions of defendants' brief which are entitled:

I. The difference which Armour attempts to create between the question presented by the complaint here and by the complaint in the *Swift* case does not exist.

II. The complaint presents many issues which must be decided in the first instance by the Commission.

III. The Interstate Commerce Commission has jurisdiction to decide this case. It is not an action for loss or damage to the shipments.

IV. The dismissal of the complaint should be affirmed because of the plaintiff's failure to join the Union Stock Yard & Transit Company of Chicago, an indispensable party.

V. The complaint against the trustees and receivers should be dismissed because of plaintiff's failure to obtain consent to bring this suit.

Reply to Part I, Pages 20-39.

It is impossible to know whether this case and the Swift case are grounded upon the same, or different facts.

Cases before courts or commissions are not decided on the facts pleaded. They are decided on the *evidence offered at the hearing.* That evidence may establish or completely disprove the allegations in the pleading. Counsel have attempted to prove from an *ex parte* rec-

ord that the facts *pleaded* in the two cases were similar. They have not shown that the facts *proven* in the *Swift* case were similar to those alleged by Swift, or admitted to be true in this case, by defendants' motion to dismiss.

One illustration will suffice. Suppose the Swift complaint was verbatim the complaint presented by Armour here (which it is not). Suppose Armour intervened and at the opening of the hearing, stated that the issues in the two cases were identical (which it did not). But suppose at the hearing, Swift offered its bills of lading, and those contracts directed delivery *"Care of Union Stock Yards Company,* Union Stock Yards, Illinois."

If the Armour bills of lading bore *no* such instruction, such an evidential difference would completely nullify the assumed similarity of pleadings and counsel's statement.

If their point is to be established *ex parte,* counsel must depart further from the record here. They must also supplement this record by appending the *entire record before the Commission,* for it was upon *that evidence,* not upon the pleadings, that the Commission made this finding of fact as to the Swift traffic there considered:

> "It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards *only* when complainant" (Swift) *"elects* to take delivery there."

Unless this court can find from the record before it (the Armour complaint) that Armour *also* elected to take the animals at the public stock yards, this case presents the same factual difference as was presented in the decisions of this court in *Adams* v. *Mills,* 286 U. S. 397; and in *A. T. & S. F. R.* v. *U. S.,* 295 U. S., 193 at 195, wherein it appeared that the only questions in-

volved were the rights, privileges and remedies of parties who had *demanded delivery of their livestock through the public stock yards,* and who had thereby deprived the carriers of their privilege to deliver any place else at the same station.

Before those cases can be controlling here, this court must find *from the Armour complaint,* that Armour similarly deprived the carriers of their right to make delivery at any other selected point at the *same railroad station,*—railroad team tracks, industry tracks, or newly constructed tracks and pens of the carriers. And this court must conclude that the administrative questions which may arise when a shipper demands something to which he is *not entitled as a matter of law* (*i.e.,* deilvery at a specific point within the limits of the destination station), also arise when the carrier is free to select any point within those station limits as the point of delivery.

At no point in defendants' brief do defendants challenge our interpretation of the law on this point. We argued that where a carrier is free to select any point it chooses at destination for tendering delivery, and fails to select a point where delivery may be had without extra charge, that damages arising from *their* failure to select a place where free delivery could be had, were recoverable in an action at law.

Defendants *beg this question entirely,* and devote themselves to an attempt to establish the *factual* defense that this freedom of choice was *not* open to them, because it appears from our complaint that we also deprived the carriers of this freedom of selection, by directing deliveries at the public yards.

This then becomes the focal issue in the case. If this court finds from the complaint that we did *not* demand delivery at the public yards, defendants present no ar-

gument controverting our application of the law in this respect.

We will merely comment upon the defendants' play upon the words "Union Stock Yards." At one time they use those words as descriptive of the *station* to which the animals were consigned "at which" (Rec. 7) the public stock yards are located. Again they use it as descriptive of a single point "located at" (Rec. 7) that station *viz.*, the public stock yards. We believe that a simple casual reading of paragraph 5 of the complaint, describing the railroad station "Union Stock Yards, Illinois," as the station *"at which"* the public yards are located, and describing the public stock yards as a facility *"located at"* the station, Union Stock Yards, Illinois, sufficiently differentiates between the *station* and the *public yards*, to contradict any implication created by defendants' play upon those words. If there be confusion remaining, we urge the principle that this court should interpret the complaint in the light most favorable to its author's contentions (*Grain Belt Co.* v. *Comm'r Int. Rev.*, 109 Fed. (2d) 490, at 492; *Leimer* v. *State Mut. Life Ins. Co.*, 108 Fed. (2d) 302, at 306).

Assuming that the court clearly understands that the public stock yards is *not* the tariff station "Union Stock Yards, Illinois," we shall consider the arguments advanced by defendants designed to prove that Armour, and not the carrier, selected this particular point within the station limits as the point of delivery. They are:

1. The language of certain portions of the complaint so imply (Bf. 26-29).
2. The implication that the team tracks and industry tracks, which were alternative delivering points, were not located at the station "Union Stock Yards, Illinois." (Bf. 30-32.)

3. The rates named in the contract applied only to the public yards, so delivery there must have been intended (Bf. 29).
4. Since the carriers contracted to carry to the "usual place of delivery" and the complaint alleges the public yards were the usual place, delivery at the public yards was contracted for (Bf. 32-33).
5. That Armour demanded delivery "in pens" and demanded that its livestock be unloaded, a duty incumbent on the carriers only when shipments are consigned to a public yards (Bf. 34-36).
6. The decision of this court may produce discrimination (Bf. 37-39).

We shall dispose of these contentions *seriatim*, and briefly.

1. *The complaint establishes that the railroad might have delivered Plaintiff's livestock at any point within the limits of the station "Union Stock Yards, Illinois" that it chose, and that its selection of the public yards, rather than team or industry tracks, or pens of its own at the same station, was its own deliberate act.*

In our opening brief we pointed out that this court had established that the selection of the specific place within the limits of the station "Union Stock Yards, Illinois" at which livestock would be delivered, was lawfully the carrier's privilege; and as long as no extra charge resulted from that selection, the shipper was without just cause of complaint (*Covington S. Y.* v. *Keith*, 139 U. S. 128, at 136). We cited paragraphs of the complaint in support of our assertion that Armour had in no way interfered with that right.

In defendants' brief certain other paragraphs of the complaint are referred to, in support of defendants'

claim that Armour, and *not* the carriers, directed delivery of these shipments to the public stock yards.

The substance of those cited paragraphs is:

1. (Par. 3) That each defendant uses a common depot or station at the destination, Union Stock Yards, Illinois.

2. (Par. 4) That such defendants' depot is owned and operated by the Stock Yards Company, and that the stock yard facilities have been designated and used by *defendants,* as their station for the delivery of livestock to commission merchants, packers and others *buying and selling livestock at Union Stock Yards.*

3. (Par. 7) That at no time do, or have, any of the *defendants* provided any other unloading facilities at the station Union Stock Yards, Illinois.

4. (Par. 19) That each *defendant* well knew it owned or operated no loading facilities at said station.

Each of these paragraphs allege an *act or omission* of the *defendant.* And from the fact that *defendants refused* to provide any free delivering facility, or any facility *other than* the public yards, at shippers' expense, defendants reason that Armour blindly accepted that refusal and, by billing its shipment to the station "at which" these public yards were located, also selected the yards. Thus, the very breach upon which plaintiff's cause of action is grounded, is sought to be converted into an estoppel.

There should be no occasion to quibble over what Armour's demand was. It is pleaded, in *haec verba* (Rec. 32, 33) and again by summary (Rec. 11). The

demand was specifically for delivery at the "pens of the carriers." (Rec. 33) Paragraph 4 of the complaint specifically states that the public stock yards were *not* the pens of the carriers.

The explanation of its demand (Rec. 36) stated that any delivery to the Stock Yards Company would constitute a conversion of Armour's property. Again the right of the carrier to select the yards and pay for them was reserved by the parenthetical phrase "(other than delivery * * * to the * * * Stock Yards Company *as your agent for unloading and delivery to us*)." These are the verbatim demands made by Armour on May 25, 1933.

The prayer of the complaint is the demand Armour made when this suit was filed. It was:

> "2. That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it at Union Stock Yards, Illinois, at the unloading pens *of the Defendants* in *the* Union Stock Yards, Chicago, Illinois, *or at such other point as same may be tendered,* upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company *or of any other person, firm or corporation.*"

If Armour was demanding delivery only at the public yards, what is the significance of the words italicized above?

The complaint alleges that the public stock yards were *not* the pens "of the carriers" (Rec. 6). And that carriers owned or controlled *no* pens in the public stock yards (Rec. 35). How could a demand for delivery at the "carriers pens" be construed as a demand for delivery at the public stock yards?

The Stock Yards Company, hearing of this controversy, was quick to note Armour's demand for delivery at "pens of the carriers," and to *deny the existence of any such "carriers' pens"* on Stock Yards property (Rec. 35). In view of these facts how could the demand for delivery at "pens of the carriers" be construed a demand for delivery in the public stock yards?

The Yards Company threatened to retain possession of every animal *"consigned to the yards of this Company"* (Rec. 35). Counsel would have the court believe that with such information at its disposal Armour continued to consign its shipments "to the yards of this company," and still seek to recover charges resulting from its (Armour's) own voluntary selection in this respect.

The complaint alleges just what Armour did after receipt of this notice: It "notified each of said defendants" of the position taken by the Yards Company, and notified defendants to *deliver Armour's stock to the Yards Company at their peril* (Rec. 12, 36, 37).

Are these admitted facts consistent with defendants' theory that Armour, and not the carriers, elected to take delivery at the public stock yards?

2. *Defendants' implication that there were no team tracks or other points available for delivery of live stock at this station is pure assumption.*

Defendants carefully refrain from any positive assertion that there are no team tracks, or no industry tracks, or other available places for delivery at the tariff station "Union Stock Yards, Illinois." They refer to a finding of the Commission referring to the choice which a shipper had of taking delivery at team tracks, in Chicago, *not* at the Union Stock Yards, or delivery to Armour's own plant (Bf. 31). They accuse us of

attempting to *leave the inference* that there were team tracks at the station "Union Stock Yards, Illinois," and that Armour's industry tracks were also at Union Stock Yards, Illinois.

We plead guilty. That is exactly the inference which is left by our brief. We do not retract it. On the merits, the court will have before it evidence of the truth or falsity of that inference. It can determine whether or not there were other available places of delivery at "Union Stock Yards, Illinois" than the public stock yards.

For the present record, this court has only the information that there was a tariff station named "Union Stock Yards, Illinois" to which this freight was consigned (Rec. 9). It knows that "located at" this station was a public stock yards (Rec. 7). Whether the limits of that station were coextensive to the limits of Cook County, Illinois, or with the limits of the public stock yards is not disclosed. On the merits, if it shall appear that the station limits were coextensive with Cook County, Illinois, one conclusion will follow. If coextensive only with the public stock yards, a different conclusion will result. We cannot imagine that this court will indulge in the assumption made by defendants (that the limits of the station and of the public yards were coextensive), any more than it will assume that the station limits extended to the Mississippi River.

The prayer of the complaint establishes that the station limits were wider than the limits of the public yards. The demand is that livestock consigned to the station, "Union Stock Yards, Illinois" be delivered *either* in the public stock yards, *"or at such other point as same may be tendered"* free of any charge except the applicable freight rates (Rec. 21). This prayer is confined to shipments consigned to the station "Union Stock Yards, Illinois." Obviously there must be some "other point"

at that station, besides the public yard, or the prayer is meaningless. It may be that the tariffs offered in evidence will establish those limits. It may be that they are established by years of custom and usage. For the present it is only important to note that they are *not* merely the public stock yards.

3. *The complaint evidences Armour's willingness to pay the rate applicable to any delivering point selected by the carriers assuming a difference in rate existed.*

On numerous occasions defendants assert that the rate named in the contracts applied *only* to the public yards. Their sole record reference to any of these assertions is "(Par. 19, Rec. 13)." We find no authority there, or elsewhere, for the statement that the rate named in the contract applied *only* to the public yards.

The sole reference to rate found in that paragraph is in connection with the carriers' knowledge. It is stated that defendants knew they had no other facilities through which they could effect delivery "for the consideration named in such contracts"; knew that *if* they used the public yards, an additional non-tariff charge would be made; notwithstanding which the carriers refused to provide at the station Union Stock Yards, Illinois, *any* depot or platform, pens or facilities, at or through which a free delivery could be had at the charges *lawfully applicable to such* transportation under such written contracts (Rec. 14).

Even if it appear on final hearing that one rate applied only to the public yards, another to team tracks, another to Armour's private siding, at this station, the complaint evidences a willingness to pay the rate *lawfully applicable* whatever it might be, and sought delivery at *that* rate, whatever it was. Of course, there is no basis for our assumption in this record, but if

there were, this argument of defendants is yet without significance.

Our definition of the terms used in our opening brief is assailed because we use "an interpretation of the complaint which the lower court rejected." That is true, and that rejection is the matter here under review.

4. *The carriers were free to establish any "usual place of delivery" they pleased.*

The complaint alleges that carriers contracted to carry to "their usual place of delivery." The complaint alleges that the public yards, was the usual place of delivery. From this, the defendants reason that Armour consigned the traffic to the public yards.

No demand was made by Armour to deliver at the public yards. No unconditional demand was made by Armour *not* to deliver at the public yards. The carriers were left free to use any "usual place of delivery" provided they made a *lawful* delivery at that point. This, they could have accomplished by arranging with their agent for the use of the Yards property, and paying the cost thereof.

The complaint is directed at the carriers' *failure to make any delivery at all.* When the cars arrived they were not tendered to Armour (Rec. 13). While the animals were still in the carriers' cars on carriers' tracks, they were unqualifiedly handed over to the Yards Company. Not until that had been done was any tender ever made to Armour, and then the tender was conditioned upon the payment of ransom. Defendants knew this would happen, so their alleged delivery was no delivery to Armour at all. It was a misdelivery to the Yards Company, and it remained a misdelivery until the railroad paid the demands of its agent so that free delivery to Armour could be made.

5. *The complaint evidences no demand for unloading services or for delivery "in" pens.*

Counsel reason that since Armour demanded unloading of its animals and since unloading was required only at public stock yards, Armour's demand must have been for delivery at the public yards.

Armour's demand was stated in plain English (Rec. 32, 33). First it was for delivery *at* "pens of the carriers." The obligation to load and unload was *controlled by the specific terms of the bill of lading* (Rec. 29) and depended upon where the "pens of the carriers" were located at destination. If the carrier selected a public stock yards as the "pens of the carriers" Armour was entitled to free unloading. If the carrier provided a pen elsewhere, the unloading fell upon Armour, by specific provision of the bill of lading (Rec. 29), by which Armour was bound.

How can it be said that Armour "demanded unloading," when the bill of lading controlled entirely?

The argument that Armour demanded delivery "in pens"; that only at public yards were the carriers required to unload and tender "in" pens; that therefore Armour demanded delivery at public yards, is grounded upon the substitution of a different preposition than the one used in the complaint.

There is nothing in that demand requiring delivery to be made *in* the delivering pens of the carrier as counsel assert. The demand was for delivery *at* such pens (Rec. 35). The spotting of a loaded car adjacent to such a "carrier's pen" would be delivery *at* such a pen, not *in* it. By changing the preposition, counsel has distorted Armour's demand to one for delivery *in* carrier's pens. And this distortion constitutes the first step in the reasoning recited in the preceding paragraph.

The specific demand made by Armour was for delivery "*at* the pens of the carrier" (Rec. 33). Its prayer in this complaint is for delivery "*at* the unloading pens of the Defendant * * * or *at* such other point" (Rec. 21). Obviously a car spotted *at* a pen designed for unloading and made available to the consignee for unloading is tendered for delivery. This is all that was ever demanded by Armour. The privilege was never granted.

Defendants' argument, based on an incomplete quotation of Armour's demands, *if* the carriers chose to use the public yards, is again advanced to discount the actual demand made, both in the letters of Armour (Rec. 33, 36) and in the prayer of the complaint (Rec. 21). It ignores what Armour demanded *if* the carriers chose to deliver elsewhere.

Armour's subsequent letter of May 16, 1933 (Rec. 36) utterly destroys the fiction created by counsels' disregard of prepositions. At that time the carriers were advised that if they continued to elect to turn Armour's property over to the Yards Company, they would be unloading it at a point where no one was authorized to receive it, and that any expense resulting from such action would be for their account (Rec. 36).

The prayer of the complaint asking for a decree, that Armour was entitled to delivery *at* (*not* in), the unloading pens *of the defendants,* in *the* Union Stock Yards (*i. e.* the public stock yards) *or at such other point* (*not* pen) *at* which (not *in* which) same may be tendered (Rec. 21) negatives any demand for unloading service, or for delivery "*in*" any particular pen or at any particular point within the station limits.

6. *The argument that discrimination may result from this court's decision is untenable.*

Keeping in mind that the sole legal question involved here is that established by this court in *Covington Stock Yards* v. *Keith,* 139 U. S. 128, repeatedly and recently cited by this court with approval, (*viz.*, that a carrier selecting a point for delivery of live stock is bound by law to select a point where free delivery can be effected), it is apparent that the only discrimination that can result from enforcing that legal principle in Armour's behalf, must arise only when some other shipper *similarly situated,* waives his right to the same privilege.

A shipper who deprives a carrier of that privilege of selecting the point of delivery (such as Swift and Company; such as the consignee in *A. T. & S. F. Ry.* v. *U. S.,* 295 U. S. 193 at 195; and the consignees in *Adams* v. *Mills,* 286 U. S. 397) is not possessed of the same legal rights and remedies as one who, like Armour, preserves the carrier's right of selection. Nor are the carriers under the same legal duties to one who demands delivery at a specific point and refuses any other delivery. It might properly be held that though a carrier is duty bound to select a point where free delivery can be had, it is not so bound, when a shipper selects, and impliedly assumes the extra costs arising at a point of delivery the shipper has selected.

The alleged discrimination referred to by defendants is merely a difference in the legal status of one shipper who contracts with the carrier *and* the Yards Company, as compared to another shipper who contracts *only* with the carrier. Such differences are not discriminatory. If Swift and Company, shippers to the market for sale, the Hygrade Company, and others, "elect to take delivery there" (at the public yards (Rec. 112)), they

must stand the legal consequences of their election. Because Armour, and the owners of "more than one-third of the direct shipments of livestock arriving at Chicago" (Rec. 112) elect to take them elsewhere, or leave it to the carrier to decide, it does not follow that their legal rights are limited by an election which they did not make. The discrimination referred to is that which results when one passenger chooses to ride in a day coach and another in a private car. Similarity of service is a condition precedent to undue discrimination.

Reply to Part II, Pages 39-66, Defendants' Brief.

There are no administrative questions presented by the complaint.

Defendants urge four administrative questions which they assert are inherent in the decision of the case at bar. These are:

1. Where does the transportation of the animals end?
2. What delivering facilities are reasonable?
3. What allowance should reasonably be made to Armour?
4. Were the freight rates paid reasonable?

All of these questions are said to arise from the allegations of the complaint, although no specific reference is given to the allegations raising these questions.

Treating these questions collectively, every one of them is grounded upon the false premise that Armour directed delivery of the animals at the public stock yard, and that because of that direction Armour's rights became indefinite. Only on that assumption is there any question of whether transportation ends in the Yards Company's unloading pens, or elsewhere in the stock yards. Only on that assumption is the suitability of the Yards Company's pens relevant. Only on that assumption can the theory of "allowance" be urged. And

only upon that assumption can the reasonableness of the rate be said to be involved.

Waiving the irrelevance of the four points by reason of the false premise upon which they are based, there are other and additional grounds, establishing the unsoundness of defendants' arguments, to which we shall briefly refer.

1. *The complaint calls for no decision of "where transportation ends."*

The cases cited by defendants do not support their statement that a court cannot decide in the first instance where transportation ends. Those decisions go no further than to hold that the Commission *has power* to decide the question, in a case properly before it, when that question is relevant.

This we concede. But in *no* case have the courts held that such power of the Commission is *exclusive*.

There is scarcely a case brought, involving the loss or damage to property in a carrier's freight house, in which the courts are not called upon to decide whether (a) the transportation had ended, or not begun, and the carrier's liability was that of warehousemen only or (b) the transportation had not ended or had begun, and the carrier was the insurer. As typical of many such cases we cite the decisions of this court in *Michigan Central R. Co.* v. *Owen,* 256 U. S. 427; and *Y. & M. V. Ry.* v. *Nichols,* 256 U. S. 540. The court there construed the bill of lading and decided the carrier's liability according to its terms, as we request the court to do here.

If the carrier did not deliver Armour's animals to the Yards Company, as their selected agent, their last connection with that property was while the animals were in *their* cars, on *their* track (Rec. 10). At that moment no tender had yet been made to Armour, at any point.

Certainly transportation had *not* ended at that time, when the wrongful act was committed. The animals were then placed in complete custody and control of the Yards Company, the carrier well knowing that no free delivery would *ever be made to Armour thereafter.*

The first question is whether, in so acting, the carrier fulfilled its contract to transport and deliver to Armour, for the applicable freight rate. That is solely a question of law. An auxiliary question is whether such conduct was in compliance with the duties which the common law imposes upon a common carrier. That is solely a question of law.

To hold that either of these questions were for the Commission would be to vest in the Commission jurisdiction of every action for damage resulting from a carrier's breach of its contracts or of its common carrier duties.

Many duties may be imposed on the carrier because of the requirement of reasonableness. Such a question may be presented when a shipper selects a specific point of delivery and demands delivery there. The carrier may or may not be required to absorb the expense of such delivery, depending upon whether such delivery is reasonable or unreasonable.

But the law does not empower the Commission to *absolve a carrier from the duty to make any delivery at all.* And these carriers made no lawful delivery at all. They turned our property over to a third person, not our agent, *before* offering it to us, and left us as best we could, to get that delivery of our property, for which we had paid the carrier. Only the courts may decide the legal effect of such conduct, and measure the damages arising therefrom. There is no question here of where transportation ends. It is whether a contract was performed or not performed. This is a simple legal question.

2. *There is no question as to the reasonableness or adequacy of the terminal facilities furnished.*

The same situation exists as to the reasonableness of the delivering facilities furnished. The complaint does not assert that the delivering facilities furnished were insufficient or inadequate. It asserts that *no* delivering facilities were *furnished at all.*

Had the defendants, after engaging the Yards Company pens, paid for them, and were we here asserting that they were not reasonable or suitable, a different question might arise. But the breach alleged in the complaint is the failure to furnish *any pens at all,* into which the animals might be unloaded, or *at* which (not *in* which) delivery might be tendered to Armour, without the imposition of an extra charge. This statement appears in Pars. 19 and 28 (Rec. 14, 17) of the complaint in positive and definite language.

The damages sought here are the cost to the complainant of the delivering facilities which the carriers elected to use; which they *should* have furnished without charge to Armour, regardless of whether they were at the public stock yards or elsewhere at the destination station.

3. *Armour rendered no service on these shipments and claims no "allowance."*

A consideration of what constitutes an "allowance" paid by a carrier to a shipper, disposes of this argument instanter.

The "allowances" of which the Commission has jurisdiction are defined in the Act as follows:

"Sec. 15 (13):

If the owner of property transported under this part directly or indirectly renders any service con-

> nected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Armour rendered no service upon these shipments. It furnished no facilities, by itself or through any agent, used by the shipments. The facilities furnished were furnished by a third person, *not Armour's agent*, at the instance of the railroads. The railroads failed to pay for the facilities which they had engaged. Armour merely paid the railroads' debt as a condition precedent to obtaining that possession of its own property, which it was lawfully entitled to receive from the railroads without payment of *any* charge save the rates applicable under the tariffs, which were paid.

If such damages constitute an "allowance" then every monetary compensation paid to shippers by carriers, for damages resulting from loss or destruction of, or damage to property, or for damages resulting from delay, or from delivery to the wrong person, or at the wrong station are also "allowances," and the jurisdiction of the courts over all such controversies between shippers and carriers is ended.

What we have said as to allowances also applies to defendants' assertions that payments of the amounts sought would constitute a "rebate" from the line-haul rate. If so then every payment made for lost or damaged property, or erroneous or wrongful delivery is also a rebate in violation of the Commerce Act, unless approved by the Commission.

4. *The reasonableness of no rate is involved.*

Commingled with defendants' foregoing argument is the claim that the case requires some consideration of whether the line-haul rates were reasonable or unreasonable.

This argument is predicated solely on the assumption that the amounts paid by Armour were for services and facilities rendered between the Yards Company's unloading pens, *into which it is assumed* Armour ordered them, and the boundaries of stock yards property.

Defendant points to no paragraph of the complaint asserting that any rate or charge paid by Armour to the railroads or to the Yards Company was unreasonable. The Circuit Court of Appeals found that no such claim was made (Rec. 81). The fiction of unreasonableness is created by pure assumption—assumption that a question exists whether it is reasonable to charge more than the line-haul rate for furnishing ingress to and egress from the Yards Company's pens, *into which it is assumed Armour ordered them.*

The entire fallacy is disclosed when we assume that the carrier, instead of delivering to the unloading pens, had spotted the car on a team track or on Armour's sidetrack, and there tendered them to Armour. That option was open to defendants. Had they exercised it, could this complicated argument as to "reasonableness of the rate charged for using the public yards, have been made? Obviously not.

It follows that the carriers argue that they may *import* questions of reasonableness into their dealings or not, dependent upon *whether they select one point of delivery or another.* The jurisdiction of the courts and of the Commission cannot depend upon the carriers' whim.

Summarizing:

Every one of the four arguments we have just discussed; where transportation ends; what delivery facilities are reasonable; whether an allowance is sought; or whether the rates were reasonable; spring from the deliberate use of the public stock yards by the carriers. Not one of the arguments advanced could exist, had the carriers elected to deliver elsewhere at this sttaion. Then, there would have been no unloading, no question of crossing Yards Company property, no question of allowance.

All of these arguments are an attempt of the carriers to lift themselves by their own boot straps. *They* chose the public stock yards. By that choice they made all of these arguments possible. Had they chosen a different point and means of tendering delivery, every argument they advance would become instantly moot.

We do not believe this court will permit these carriers to control the tribunals in which they may be made to respond, merely by the selections which they make, as to the manner in which they choose to break their written contracts and breach their common law duties.

5. *No demand was made by Armour which could not be legally made by any consignee on any carrier, at any station.*

For the first time in the history of this proceeding, defendants have undertaken to face the situation which is created when it is realized that there *were* other places than the public yards at the station "Union Stock Yards, Illinois" at which delivery of these shipments might have been tendered to Armour.

Stressing the point that Armour could have *directed* deliveries at other points, and ignoring the thought that carriers too could have selected such other points had

they wished; and ignoring the possibility of team track delivery (which the Commission found was being extended to other packers); and ignoring the possibility of delivery on Armour's own tracks at the applicable rate; counsel considers the idea of the carrier constructing some pens of its own at this station.

From this limited point of view it is asserted that the complaint seeks an injunction directing the carriers to build such pens, and damages for their past failure to build them. And upon this assumption of a demand that was never made, the defendants proceed to argue:

1. That only the Commission could command the carriers to build such pens.
2. That only the Commission may determine whether the facilities existing elsewhere in the *Chicago district* (not merely at the station "Union Stock Yards, Illinois") are adequate.
3. That only the Commission can decide what the freight rate should be to such newly constructed facilities.
4. That only the Commission could find the station limits within which these facilities should be built.

Underlying all of these points is the assumption that Armour demanded pens to be built. Armour's demands would have permitted the Yards Company's pens to be used* or leased; it would have permitted the same ten-

* If we may assume that this court will take judicial notice of decisions of the Commission, issued and printed under authority of Congress, the court may know that during a considerable portion of the time here involved, the Stock Yards Company, by tariff filed with the Secretary of Agriculture, held themselves out, for $3.00 per car, not only to unload and count the animals, notify the consignee of arrival, furnish lists of dead and crippled animals to carriers, furnish weights on directs, collect and remit freight charges on such livestock, but also to furnish "as the railroad's agent *such services and facilities as the railroad is required to furnish in making delivery of such livestock to consignee thereof.*" (See *Livestock to and From Union Stock Yards, Chicago*, 222 I. C. C. 765 at 769.

der of delivery on team tracks at this station that other packers were receiving (Rec. 112); or it would have permitted delivery on Armour's own track. In any of these events the argument made under this heading would be moot. The complaint asked no pens to be built. It asked only that some method be adopted under which the carrier will *observe its legal obligation* to make a free delivery of property it transports to this station "Union Stock Yards, Illinois."

The obligation to furnish some such facilities at some point within the limits of a station to which a carrier publishes rates is absolute and is imposed by law. If none exist, but such are demanded, the law requires the carrier to either *provide such facilities* or *cancel its rate and retire from transportation to that station.* These carriers did neither.

We concede that had the carriers built such pens, and believed that their rate was thereafter unremunerative, they could have then applied to the Commission for a rate increase; and that the Commission alone could have decided the measure of the rate to be applied. But this situation *never arose.*

To argue that the Commission could relieve the carriers from this common law duty, is to endow the Commission with powers to overturn the repeated decisions of this court (*Covington Stock Yards* v. *Keith,* 139 U. S. 128; *Erie R. R.* v. *Shuart,* 250 U. S. 465; *U. S. Y. & T. Co.* v. *United States,* 308 U. S. 213 at 219), and excuse the carriers from duties imposed by this court.

One other false assumption is indulged in. It is said that the Commission must fix the limits of the station "Union Stock Yards, Illinois," because this court so held in *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 247. The decision refers to a case where *no tariff named the station limits.* Such is not shown to

be the case here. If such situation appear perhaps the court should then "stay its hand" (as this court suggested in *Gen. Am. T. C. Corp.* v. *El Dorado T. Co.*, 308 U. S. 422). But time for that situation will not arrive until hearing on the merits.

6. *There is no violation of the Commerce Act involved, so the essential requirement for Commission jurisdiction is not here.*

Reply to the third major division of defendants' brief is made simple because of the fact that defendants take *no issue with the law* as stated by us, in our prior briefs herein (Pg. 12, et seq., Bf. in support of petition; Pg. 14, Bf. for petitioner), *viz.*:

> "The cases of which the Commission has exclusive jurisdiction have recognized fundamental characteristics:
>
> (1) They must involve *some* violation of *some* provision of the Commerce Act by a common carrier subject thereto.
>
> (2) The violation of the Act must be one which exists or does not exist, depending upon whether, in the administrative judgment of the deciding tribunal, the evidence warrants the factual conclusion that the acts complained of fell within a generic description, forbidden by the Act; *i.e.*, unreasonable, preferential, etc.
>
> If either of these conditions be absent, there can be no exclusive jurisdiction by the Commission."

Apparently conceding the accuracy of this point defendants choose to argue that the requirements of the law as above stated, are met here. The following asserted violations of the Act are said to be alleged in the complaint:

1. That the *Swift* case alleged unreasonableness in violation of the Act, and Armour intervened in the *Swift* case.
2. The practice of making deliveries at the public stock yards involves questions of reasonableness under the Commerce Act.
3. The charges paid by Armour were for transportation services, and were not filed with the Commission. Therefore an overcharge exists which is in violation of the Commerce Act.*
4. Armour relies upon Section 15(5) of the Act, requiring carriers to unload at public stock yards.
5. Armour asserts that the services for which the yardage charges were paid were services included in transportation as defined by the Act.
6. Armour demands an allowance, provided by the Act.

Replying:

1. Armour asserted no violations of the Act in the *Swift* case.

The Armour petition in the *Swift* case specifically refrained from any concurrence in the only paragraph in the Swift complaint, alleging any violation of the Commerce Act (Def. Brief, Appendix Pg. XVII). It asked no relief at the hands of the Commission. Even had Armour not thus refrained from alleging any violation of the Commerce Act, or from asking any relief of any sort from the Commission, it would not be barred from electing its remedies. It had *first* elected its remedy in court. Any estoppel would run against its second selection.

*This is the sole violation of the Act found to exist by the Circuit Court.

Armour's statements before the Commission were never of record before the Circuit Court of Appeals. They were never of record in the District Court save as part of defendants' brief. They were never certified to in *any* court, by *any* clerk of any court until December 17th, 1940 and no notice of their inclusion in any record in this court was ever received by us until January 6th, 1941, one week before the week set for argument before this court.

Waiving the impropriety of those asserting facts now, they throw no light upon whether or not the complaint before this court states a cause of action of which the courts of law have original jurisdiction. Since they are moot to any question before this court, we dismiss them, with the assurance that at the proper time, on the merits, we shall completely refute the innuendoes created by this last-minute insertion in this record, merely by proper and timely reference to other portions of that record which counsel have omitted from their present eleventh-hour presentation.

2. The reasonableness of no "practice" at any public yard need be determined.

The entire argument as to reasonableness assumes deliveries at the public yards. When no such delivery is demanded by consignee, but result solely from the option of the carrier, the question of reasonableness under the Commerce Act cannot arise, unless this court will permit the carriers to *control the tribunal in which they must answer, by making one selection as to one shipment, and a different selection as to another,* thus sending one shipper to the Commission, and another to court, with the same cause of action for breach of contract and common law duty.

3. No transportation contract ever existed between Armour, and the person to whom the charges were paid with reference to these shipments.

The charges paid by Armour were for no transportation service for which Armour ever made any contract. The sole person contracting for any stock yard service was the railroad. The charges paid by Armour were ransom, pure and simple. They were analogous to drayage charges incurred because the carrier had dumped Armour's property at the wrong station.

4. Entire compliance, and not violation of Section 15(5) is asserted in the complaint.

The complaint alleges that having selected the public yards as their delivery point, the carriers fully observed and complied with Section 15(5). A *violation* of that section would be required as a condition precedent to Commission jurisdiction.

(Query: If a carrier failed to unload at a public yard, as required by Section 15(5), would a suit for resulting damages necessarily involve such complicated facts, that the courts would be incompetent to pass upon the factual question of whether the animals were unloaded or not as the law required?)

5. The services of the Yards Company were no part of the transportation for which Armour contracted.

Armour makes no allegation that the services of the stock yard company are necessarily a part of transportation. It contends merely that the common law requires the carrier to provide *some* delivering facilities, *some*where at the destination station. And it contends that it pays for such facilities in the transportation rate. Therefore it is carriers' duty to provide them.

The carrier cannot escape this legal duty by selecting a public stock yard, and thus impose the costs resulting from its selection upon the shipper.

6. No allowance is involved.

We have previously shown that Armour rendered no service to the animals in question on carrier's behalf, and asks no allowance.

Summarizing:

Each of the points above discussed would be moot, once had the carrier, instead of choosing the public yards as its delivery point, chosen a team track, Armour's siding, or new pens of its own, at the same station. Had they offered delivery at Armour's siding, or on team tracks, the *Swift* case involving deliveries at public yards; the practices at public stock yards; Section 15(5), and the other subject advanced would be wholly irrelevant to any question presented.

Can the carriers, *create* these questions merely by a conscious selection of the stock yards as their point of delivery?

Reply to Part III, Pages 66-79, Defendants' Brief.

The complaint sets forth a simple action for damages from misdelivery.

Defendants attempt to remove this cause from the rule announced by this court in the *Galveston* and *Shuart* cases (223 U. S. 481; 250 U. S. 465) produces a novel conception of loss or damage. It seems to be counsels' theory that unless the *goods themselves* be lost or injured, that there can be no application of the cases cited.

Loss or damage may occur to a shipper when the goods themselves are intact. Thus in *C. M. & St. P. R. Co.* v. *McCaull-Dinsmore,* 253 U. S. 97, decided by this court, the goods were in first class condition, but they

had been negligently delayed by the carriers. A market decline occurred after the goods should have arrived. Under counsels' theory that case should have gone to the Commission, because no injury occurred to the *goods*.

Another frequent cause of damage is misdelivery at the wrong station, necessitating drayage or other transportation expense, to get the goods to the correct destination. Yet the goods themselves are unharmed.

"Loss and Damage" cases include these and many other cases where, though the goods were finally received uninjured, the owner has suffered pecuniary loss which, but for the carrier's breach of duty he would not have suffered. In the case at bar, Armour was compelled to buy that possession of its own property, which it was legally entitled to receive from the carrier without extra charge. The cause of that expenditure was basically, the carriers' total failure to provide at this station any facilities for free delivery which the law required them to furnish; and, directly, their delivery of Armour's property to a third person, with full knowledge that Armour would never receive it save by payment of ransom to such third person.

1. The substance, as well as the form of statement, of the case at bar, brings the case squarely within the principle announced by this court in *Galveston, Harrisburgh and San Antonio R.* v. *Wallace* (223 U. S. 481).

We concede that the mere fact that we rely upon a common law right is not sufficient to qualify the court of law as the tribunal empowered to try the case. The original *Abilene* case was based upon the plaintiff's common law right to a reasonable rate. The principle there laid down that where the existence or non-existence of the right required the experienced judgment of the Com-

mission, and where it was necessary to reach an intermediate factual conclusion (of reasonableness) before the legal conclusion (of unlawfulness) could be reached, primary resort must be had to the Commission.

The *Galveston* case (223 U. S. 48.) was decided by this court *after* the *Abilene* case. There, as here, the carriers argued that the mere fact that the shipper relied upon his common law right to receive delivery of his property did not remove the case from the category of those covered by the *Abilene* case. This court quickly disposed of that argument as follows, at page 491 (emphasis supplied) (page 490):

> "But damage caused by failure to deliver goods is in *no way traceable to a violation of the Commerce Act,* and is *not* therefore within the provisions of Sections 8 and 9 of the *Act to Regulate Commerce.* (*Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 208.)"

Here, the carriers failed to deliver Armour's goods as their contract and common law duties, and as the Federal Bills of Lading Act required them to do. As a result Armour was compelled to *buy* that possession of its property, which it was entitled to receive under the line-haul rate. The carriers' failure to perform their legal duties was the sole and direct cause of that unwarranted payment of the money here sought to be recovered.

If we may substitute "misdelivery of" for "failure to deliver" in the above quotation this case becomes res adjudicata.

Reply to Part IV, Pages 79-85, Defendants' Brief.

The Stock Yards Company was not a necessary party defendant.

In our original brief (page 27) we fully covered the error in the opinion of the District Court in this regard.

Attempting to refute this argument, defendants have urged ten points, *viz.*:

1. That a contractual obligation, made in 1892, to use the yards, bound Armour to such use.
2. That the complaint alleges that no other facilities were available for delivery at this station.
3. That defendants do not control the assessment of yardage charges published and filed with the Secretary of Agriculture.
4. The complaint asks the court to hold the yardage charge unlawful, and the practices of the Yards Company wrongful.
5. The plaintiff is asking the court to adjudge that plaintiff is entitled to consign its livestock for delivery *at the Union Stock Yards,* and to receive them without paying the tariff yardage charges, and to order free egress to be provided, etc.
6. It would be utterly impossible for the carriers to obey the injunction asked for, unless also directed against the Yards Company.
7. If the injunction were issued, and the Yards Company demanded exorbitant charges the railroads would be helpless.
8. Plaintiff addressed its demand to the Yards Company as well as the railroads.
9. The Yards Company was a party to *Atchison, T. & S. F.* v. *U. S.,* 295 U. S. 193 and to *Adams* v. *Mills,* 286 U. S. 374.
10. The complaint asks freedom of plaintiff's property from any lien of the Yards Company.

These arguments may be answered collectively by calling attention to the fact that the carriers were *never required to go near the stock yards property in order*

to tender delivery of Armour's animals. The carriers went there of their own choice, against Armour's will, rather than tender delivery to Armour elsewhere at the same station. By making a *different choice, they may relieve themselves* from the sad predicament they picture.

But, there are additional answers to these claims. Many of them are grounded upon fragmentary quotations from the record. When the quotation is completed the argument is refuted. Others are grounded upon facts not of record in this case. Others are without any factual foundation whatever, save the unsworn statement of counsel. We will touch upon each of the ten points above named very briefly.

1. The "contractual obligation" referred to, between Armour and the Yards Company, is not of record in this case. Supporting reference is not made to the record here, but to the Commission's decision on a *different* record, not before the court here.

The contract referred to in that decision is alleged to have been made in *1892*. It does not appear that the plaintiff corporation was then in existence. Only on the merits can this be determined. The contract referred expired in 1907. Any renewal of continuance of that contract was made impossible by the decision of this court in *U. S.* v. *U. S. Y. & T. Co.*, 226 U. S. 286. The court has nothing before it now, warranting either counsels', or the Commission's statement that after the contract had expired, and its extension declared void, that there remained any obligation binding this plaintiff to use the yards in perpetuity.

If there were any such agreement, the defendants will have ample time to assert any estoppel created by it, at hearing on the merits. Certainly there is nothing of record before this court now, upon which this court may adjudicate that question on motion to dismiss.

2. Not only does the complaint state that there were no other unloading facilities in existence at this station, but it asserts that carriers refused to provide any others at this station, or to pay for the one they elected to use. Counsel's reasoning, that because there were no other facilities in existence, the use of such facilities was imperative is a *non sequitur,* and entirely overlooks the ability of the carrier to provide other facilities either by lease, construction, team track or industry track delivery or otherwise or failing in this, their right to cancel their published rate. Whether by reason of congestion of buildings, excessive cost or otherwise, the carriers were unable to provide other facilities, is a matter for consideration on the merits, not on motion to dismiss.

3. Defendants, and defendants only, controlled the assessment of yardage charges on the shipments in question. By stubbornly continuing to deliver Armour's property to the public yards, they caused these tariff charges to become applicable. Had they tendered delivery elsewhere (as they were free to do) no such charges could have become applicable.

4. No reference is made to any statement in the complaint attacking the lawfulness of the yardage charges, or the practices of the Yards Company. We concede both to have been entirely reasonable and lawful. Our complaint arises because of the conduct of the carriers, by reason of which these lawful charges became a lien upon our property against our will.

5. Defendants resort to the device of fragmentary quotation, and unsupported statements, in their attempt to support their assertion that Armour asks delivery of its animals "at the Union Stock Yards" without payment of the tariff charges of the Yards Company.

In quoting from our complaint, counsel constantly

omits and ignores the alternatives appearing in italics below:

> "* * * free from any lien or claim of the Stock Yards Company, *or of any other person, firm or corporation.*"
>
> "* * * without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company, *or any other person, firm or corporation.*"

The complaint asks freedom from extra charge by *anybody*. The fragmentary method of quotation distorts the meaning so as to limit the prayer to cover Stock Yards deliveries only.

We do ask recovery of damages for past payments of yardage charges to the Stock Yards Company, as that happens to be the measure of damage suffered by reason of carriers' failure to tender the free delivery of our property to which we were legally entitled.

6, 7. The argument that carriers cannot obey the injunction prayer, or would be helpless against exorbitant charges, unless the Yards Company be a party, is absurd. The carriers have clear remedies open to them.

(1) They may deliver elsewhere at the same station and *stop hiring* the Yards Company.

(2) As patrons of the Yards Company, a proceeding before the Secretary of Agriculture protects them against any unreasonable charges by that Company.

No question of "suitable egress" from the property of the Yards Company appears, until after the carriers have chosen to deliver Armour's livestock to the Yards Company, upon their property.

8. The statement that our original "demand" was also addressed to the Yards Company, is pure fiction, and

may be so proven from the record. Having made our demand upon the principals (the carriers) our letter to the Yards Company was merely a notice of our intention, and a *statement of fact*. No demand of any kind can be read into the language of that notice to the Yards Company (Rec. 34, 35).

9. The Yards Company was a party to the *Atchison* and *Adams* cases, because, as we have shown, in those cases delivery at that specific point was demanded or acquiesced in by the shipper. There was in those cases the "tri-party relationship" to which the Circuit Court referred. No such relationship, or no contractual relationship of any kind existed here, between Armour and the Yards Company.

Reply to Part V of Defendants' Brief.

The receiver and trustee defendant are properly sued.

To support their contention that the Federal receiver and trustees may not be sued without consent of their appointing courts, defendants cite the decision of this court in *Barton* v. *Barbour,* 104 U. S. 126, decided in 1881.

Section 65 of the Judicial Code was enacted *after* that decision. It requires all Federal receivers and trustees to "manage and operate" the property in their possession "*according to the valid laws* of the state in which the property shall be situated in the *same manner* that the *owner or possessor thereof would be bound to do* * * *." (It is axiomatic that a Federal receiver must obey the Federal Law.)

The state and Federal law required the original owners and possessors of these properties to *provide a place for the free delivery of livestock transported by them.* This statute imposed the same obligation upon these receivers and trustees.

Section 66 of the same act, also enacted *after* the decision in the *Barbour* case, authorizes any suit, arising out of any act done "in carrying on the business connected with such property" to be brought against such appointees without consent of the appointing court.

This suit arises from the failure of these trustees, in carrying on their railroad business, to observe the requirements of the law with respect to furnishing a place for the free delivery of property transported. The alleged interference with their management is the *interference of the law,* designed to prevent such appointees from trampling upon the legal rights of their customers.

The injunction sought, merely asks that they be *commanded to obey the law,* and furnish, at their tariff station, a place for the free delivery of livestock which they transport and from which they receive revenue. No interference with the custody of their property is asked, no obligation is sought to be imposed upon them except the *obligation of the law,* which thus far, they have wilfully and stubbornly disregarded.

Should the time come for the issuance of execution to enforce collection of a judgment from the corpus of the estate, of course a different situation will be faced.

Most Respectfully Submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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Respondents.

THE OPINIONS BELOW AND THE REPORT OF THE INTERSTATE COMMERCE COMMISSION ON THE SAME SUBJECT MATTER.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint, was filed May 31, 1939. It is reported in 27 Fed. Supp. 625, and appears at pages 46-55 of the record.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit affirming the dismissal of the complaint was filed April 4, 1940; the opinion of the court on rehearing was filed May 21, 1940. Both opinions are reported in 111 F. (2d) 913, and at pages 77-86, and 91-92 of the record.

A proceeding before the Interstate Commerce Com-

mission to which Armour and Company was a party, involving the same subject matter as that of the complaint herein, was initiated shortly prior to the commencement of this case, was decided April 8, 1940, and is reported in 238 I. C. C. 179. The official report of the Commission, together with the certificate of the Clerk of the Circuit Court of Appeals stating that the report is of record herein, is made an appendix to this brief.

STATEMENT OF THE CASE.

This is the brief of seventeen of the twenty-one respondents named in the complaint, which are trunk line railroads serving the Union Stock Yards at Chicago. That yard, operated by the Union Stock Yard and Transit Company of Chicago, is designated by the Secretary of Agriculture as a public stockyards pursuant to the Packers and Stockyards Act, 1921 (7 U. S. C. A. Sec. 202). (R. 7.)

For more than seventy years the Stock Yards Company has assessed a so-called yardage charge on all livestock received at the Union Stock Yards[1] and since the enact-

1. In *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 199 (1935), this Court referred to the yardage charge assessed by the Stock Yards Company as follows:

"Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills*, *supra*. While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received*. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock." (Italics added.)

ment of the Packers and Stockyards Act in 1921 this charge has been published in the tariffs filed by the Stock Yards Company with the Secretary of Agriculture.

Throughout this entire period of seventy years, petitioner and all the other packers receiving livestock at the Union Stock Yards have paid the Stock Yards Company the charge which is presently assailed. They now contend, however, that it is the obligation of the railroads under "their contract of transportation" and in return for the freight rate which they receive, to provide the services and facilities required in handling the livestock after it is unloaded in the pens at the yards, and thus to relieve the packers of the charge assesed against them by the Stock Yards Company. (Complaint, paragraphs 23-25; R. 15, 16; Appendix, this brief, p. 180.)

The respondents have already taken the position that the transportation service and their obligation in respect to livestock consigned to the Union Stock Yards at Chicago end with the unloading of the animals into the pens at the yard.[1] In making their demand upon the respondent carriers for a change in the long standing practice the Chicago packers acted in concert. (R. 32-38; Appendix, p. 183.) Upon the rejection of this demand Armour took action both before the Interstate Commerce Commission, and, by this proceeding, in court; Swift and Company proceeded only before the Commission. Swift's complaint before the Commission alleged that the failure of the respondents to relieve it of the imposition of the charge by the Yard Company was an unreasonable practice in violation of the Interstate Commerce Act. (Appendix, p. 180.) Armour intervened in that proceeding in support of the complaint, advising the Commission

1. This Court so held in *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 201 (the so-called *Hygrade* case).

that it had instituted this proceeding in court "involving substantially the same issues and praying for similar relief."[1]

In the proceeding before the Commission respondents presented their defense upon the merits of the issue. At the same time they moved to dismiss the instant complaint on the ground that it presented administrative questions requiring the prior determination of the Interstate Commerce Commission. (R. 43-45.)[2]

The District Court held that the determination of what is embraced in the transportation service which the railroads are required to furnish on livestock delivered at the Union Stock Yards at Chicago, is an administrative question for the Interstate Commerce Commission. The

1. The following is quoted from the report of the Commission:

"Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief. The proceeding in the State court was subsequently removed to the United States District Court for the Northern District of Illinois, Eastern Division, and motions by defendants to dismiss were sustained May 31, 1939." (This refers to the date of the dismissal by the District Court.) (Appendix p. 180.)

2. Dismissal of the complaint was asked on the ground also that there was a nonjoinder of the Union Stock Yard and Transit Company of Chicago, which is an indispensable party to the determination of the suit for the reason that the yardage charge complained of is assessed and retained by the company, and the unloading is performed on its premises and by its employees. (R. 44.) The trustees of several of the respondent carriers in the process of reorganization under Section 77 of the Bankruptcy Act, asked dismissal on the ground that the action could not be maintained without leave of the court which appointed them. (R. 74-75.) The District Court sustained the motions to dismiss on these two grounds as well as upon the principal ground that the complaint presented an administrative question for the Commission. (R. 54-55.) The Circuit Court of Appeals sustained the District Court on the latter ground and found it "unnecessary to rule" on the other two points. (R. 86.)

Circuit Court of Appeals affirmed the dismissal by the District Court, stating:

> "To solve this controversy it is necessary to determine what in actuality the service is that is being rendered, whether it is one which the rail carriers are bound to furnish, and whether it is already included in the line-haul rate. The inquiry necessarily compels recourse to certain facts, such as the history of the Chicago stockyards; the use of these yards as the carriers' usual place of delivery; the history of the yardage charge; the tri-party relation; and many other intricate facts of transportation incidental to rate-making.
>
> * * * * * * *
>
> "Our conclusion is that this case presents a controversy whose solution necessitates the exercise of administrative discretion, and therefore prior administrative resort is imperative." (R. 84.)

Although petitioner has sought throughout this proceeding to argue the merits of the administrative question presented by its complaint, just as it does in its brief in this Court, the sole issue has been one of procedure as the courts below have held. During the progress of the proceedings in court, however, the Commission proceeded to conduct hearings in the case before it on the merits of the administrative question presented. On an extensive record and a full showing of the very character of evidence upon which the Circuit Court of Appeals declares the administrative question must be decided, the Commission has decided the administrative question adversely to the contention of the packers, holding that the transportation of these shipments and the obligation of the respondent carriers end with the unloading of the livestock into pens at the yards.

The Commission's report, published a few days after the decision of the Circuit Court of Appeals, was brought to the attention of the court by Armour and Company

with its petition for rehearing in which Armour contended that the administrative question having been decided by the Commission, the Circuit Court of Appeals should remand this case to the District Court for trial. It was in response to that contention that the court below in its opinion on rehearing stated:

> "Since our decision the Interstate Commerce Commission has adjudicated the administrative problems against Armour, i.e., it has found that the transportation of livestock consigned for delivery at this common livestock depot ends at the unloading pens and that hence the carriers' failure to afford free egress is not an unreasonable practice."
>
> * * * * *
>
> "* * * the adverse administrative adjudication, unless disturbed in proper course, stands in Armour's way." (R. 91-92.)

SUMMARY OF ARGUMENT.

1. The alleged conflict in the decisions of this Court as to where transportation of livestock to a public stockyards terminates is irrelevant. Even if there were such a conflict, and there is not, it could not be resolved by granting a writ of certiorari in this case since the only issue here is whether the Interstate Commerce Commission has exclusive primary jurisdiction of petitioner's complaint, as the courts below have held. The cases alleged by petitioner to be conflicting on the merits establish that the issues presented by the complaint are administrative and require preliminary resort to the Commission.

2. The Circuit Court of Appeals has not departed from the usual and accepted procedure by finding that there is a tri-party relationship between petitioner, respondents and the Stock Yards Company.

3. The complaint constitutes an attack upon a long established practice and requires a determination of (a) whether the services and facilities provided at the Chicago Union Stock Yards are part of transportation or whether they are provided after transportation, and the responsibility of respondent carriers, has terminated, (b) the adequacy of the delivery facilities and services at those yards, and (c) the reasonableness of the rates of the Stock Yards Company. This Court has repeatedly and consistently held that such issues require preliminary resort to the Commission.

4. This suit is not one for loss or damage to the shipments and decisions that loss and damage cases may be decided by the courts without preliminary action of the Commission are irrelevant here.

5. The complaint is based on alleged violations of the Interstate Commerce Act which necessitate the preliminary administrative decision of the Commission.

6. The issues and facts of this case are identical with those in *Swift & Co. et al.* v. *Alton Railroad Co. et al.*, 238 I. C. C. 179, in which petitioner was a party. In that case, decided while the instant case was pending in the Circuit Court of Appeals, the Commission decided the issues adversely to the packers. That administrative adjudication is binding upon petitioner unless set aside in proper proceedings upon review.

REASONS FOR DENYING THE WRIT.

1. The Alleged Conflict in the Decisions of This Court.

The first proposition argued by petitioner is that there is a conflict in the decisions of this Court with respect to whether transportation of livestock to a public stockyards terminates at the unloading pens or continues to some point beyond. (Petition, pp. 10, 11-15.) The contention has no relevance here. The courts below did not pass upon that question nor did they decide that petitioner did or did not have a right to demand that respondent carriers change the established delivery practices at the Chicago Union Stock Yards. Instead, the decisive ruling was that the courts could not and should not pass on such a question in the absence of a prior administrative decision on petitioner's complaint. In other words, if it be assumed that there is a conflict in the decisions as to where transportation of livestock to the Chicago Union Stock Yards ends, as there is not, such a conflict could not possibly be resolved by granting the writ of certiorari. The lower courts have made no finding on that issue; on the contrary, they have held that the question, and the other administrative questions presented by the complaint, are of a character of which the Commission has exclusive primary jurisdiction. More specifically, petitioner's argument that the rule laid down in the *Hygrade* case[1] should "be reversed or clarified" by this Court (Petition, p. 15) is quite beside the point since neither of the lower courts ruled on the administrative questions raised by the complaint as to the scope of

1. *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935).

transportation and the reasonableness of the established delivery practices, and they are not now before this Court for reconsideration.

In one particular, however, the cases cited by petitioner in an effort to show a conflict in the decisions of this Court as to what is embraced in the transportation service on livestock consigned to public stockyards are germane. The fact is that in every one of the cases decided since the passage of the Interstate Commerce Act and cited by petitioner as being identical with or substantially similar to the present case, the case was decided by the Interstate Commerce Commission in the first instance, as an administrative matter, and it was the findings and orders of the Commission which were reviewed by this Court, *Adams* v. *Mills*, 286 U. S. 397 (1932); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935) (commonly referred to as the *Hygrade* case); *Union Stock Yard and Transit Co.* v. *United States*, 308 U. S. 213 (1939).[1]

In the *Hygrade* case, *supra*, the Commission, and thereafter this Court, dealt with the identical issue again presented by Armour's complaint here, and decided it adversely to petitioner as recognized in the petition for certiorari. Not only is there no conflict between those cases as petitioner contends, but they directly support the principle that the issues presented both there and here are administrative and require preliminary resort to the Interstate Commerce Commission.

1. The only other case cited by petitioner in this connection arose and was pending in the courts before the enactment of the Interstate Commerce Act creating the Interstate Commerce Commission. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128 (1891). The Interstate Commerce Commission was created and the doctrine requiring preliminary resort to a single body on administrative questions relating to railroad transportation was established, for the purpose among others of avoiding conflict and discrimination arising from the previous concurrent jurisdiction of the courts.

2. The Alleged Departure of the Circuit Court from the Usual and Accepted Procedure.

Petitioner's second proposition is that the Circuit Court departed from the usual and accepted procedure by finding "that a 'tri-party' contractual 'relationship' existed" between petitioner, the respondents, and the Stock Yards Company. (Petition p. 15.) Petitioner argues that "the complaint establishes that no contractual relationship" existed between petitioner and the Stock Yards Company. (Petition pp. 15, 16.) The fact is that the court nowhere referred to a "contractual" relationship. The word is gratuitously added by petitioner to the court's statement that there was a "tri-party relationship," a statement which can hardly be questioned. (R. 83, 84.)

In the same connection petitioner urges as a reason for granting certiorari that the Circuit Court said that "in substance the complaint states a claim based on overcharge." (Petition p. 16; R. 82.) Petitioner's argument is that there is no overcharge because the respondents received no more payment than their published line-haul rate. But this ignores what is the essence of the complaint. Petitioner seeks the repayment of charges which were assessed and collected by another common carrier, the Stock Yards Company, in accordance with a tariff filed with the Secretary of Agriculture but not published with the Commission. It is contended that the facilities and services furnished on these shipments by the Stock Yards Company for which the disputed charge was levied should constitute a part of transportation and that compensation is included in the line-haul rate. Although all of these contentions have been denied by this Court or by the Commission in the *Hygrade* and the *Swift* cases, nevertheless the theory of the complaint, of necessity,

is that the petitioner has been charged an excessive amount for what is alleged to be a part of the transportation services, in other words, as the court designates it, an "overcharge."

3. The Alleged Conflict of the Circuit Court's Decision With Other Cases.

In its third point, petitioner argues that the decision below is in conflict with those cases which have held that where no administrative questions are involved the courts have concurrent primary jurisdiction with the Commission. Petitioner would thus avoid the fact that the complaint here does present administrative issues of the character which this Court has uniformly held to require preliminary resort to the Commission. The District Court outlined the petitioner's demands for a change in the method of delivery at the Chicago Union Stock Yards,[1] and found that the complaint comes "squarely within the rule" laid down by this Court in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922) as to the necessity for preliminary resort to the Commission when, as here, the "enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission." (R. 53.) The Circuit Court came to the same conclusion, summarizing the exclusively administrative issues in the por-

1. It is admitted in the complaint that for many years prior to May 25, 1933, the petitioner made "similar shipments of livestock to itself at Union Stock Yards, Illinois" and that the transportation thereof had been completed and the contract had been completely performed by respondents before their removal from the Union Stock Yards. (R. 10, par. 15.) No change in the tariffs or in the contract is alleged but petitioner's position is that it may by its own demand upon the respondents extend the scope of transportation and increase the duties of respondents under the contract.

tion of the opinion quoted on page 5, *supra*. These issues are briefly described in the following paragraphs.

One of the most important of the issues raised by the complaint is whether the services and facilities provided at the Union Stock Yards after the unloading of these shipments are a part of transportation, or whether they are provided after transportation, and the responsibility of respondent carriers, has terminated. In *Adams* v. *Mills*, 286 U. S. 397 (1932) this Court held that the determination of the scope of the transportation service on inbound livestock shipments to the Chicago Union Stock Yards was not a pure matter of law but was a matter for the Commission, and that its conclusions could not be disturbed if there was evidence to sustain them. Mr. Justice Brandeis stated, for the Court, as follows:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto." (pp. 409-410.)

This Court has already held, therefore, that under the rule of the *Merchants Elevator* case, *supra*, relied upon by the lower courts, the very character of question raised by this complaint is an administrative one for the Commission. As long ago as 1913 this Court ruled that when the limits within which transportation begins or ends were questioned, "the Commission alone could act." *Mitchell Coal Co.* v. *Pennsylvania R. R.*, 230 U. S. 247, 263, 264. The determination of the scope of the transportation service on inbound livestock shipments at the Chicago Union Stock Yards falls squarely within this rule, as the courts below have held.

In addition to the determination of the scope of the transportation service, this complaint requires a decision upon the kind of delivery facilities and services which are necessary and adequate to meet the obligations of the respondents in return for the freight rates prescribed by the Commission[1] and under the terms of the livestock contract likewise prescribed by the Commission.[2] For example, to grant the mandatory injunction prayed for, which would change the long established practice, would require the court to determine what would be "suitable" ingress, and "proper and reasonable" egress at the Union Stock Yards. (R. 21.) But this Court has long held that the definition of the "services covered by a carrier's published tariffs" and the determination of the "character of equipment which it must provide" must be made by the Interstate Commerce Commission before they may be submitted to a court. *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43, 50 (1916). These are matters which are peculiarly administrative and uniformity among shippers could not be preserved if they were not determined in the first instance by the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922).

In addition, the allowance of damages for the past shipments would require the court to decide whether the yard-

1. *Livestock, Western District Rates*, 176 I. C. C. 1 (1931).

2. The gravamen of the complaint is that respondents failed and refused to provide certain services and facilities "all of which Defendants are required by their contract of transportation and by law to provide." (R. 16.) The "contract of transportation" upon which the complaint thus rests is the Uniform Live Stock Contract which was prescribed by the Commission itself. In *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935), (the *Hygrade* case), this Court in a case presenting the same ultimate issues as the one at bar, stated:

> "* * * the Interstate Commerce Commission, acting under authority of Sec. 15(1) and following a form of clause submitted by shippers and carriers, *prescribed a uniform livestock contract* * * *" (p. 198.)

age charges of the Stock Yards Company were unreasonably high, and if so, what the exact amount of the reasonable charge would have been at the different times the shipments were made. The Commission has held that the line-haul carriers have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. (Appendix, p. 188.) The line-haul rate contains no allowance for such services. Petitioner cannot be given these services free of charge; unless it has been required to pay more than a reasonable amount for such services, it has suffered no damage even on its theory that they are part of the transportation. But the determination of whether the rates of the Stock Yards Company for those services have been excessive is an issue which must be decided by the Commission in the first instance. This Court recently denied certiorari in a case, strikingly like the present one in respect to this point, where, as here, a shipper attempted to recover from a railroad the yardage charge of a stockyards company which had been levied for services which the plaintiff alleged were a part of transportation. *Aron* v. *Pennsylvania R. R. Co.*, 80 F. (2d) 100 (C. C. A. 2d, 1935), certiorari denied, 298 U. S. 658. The Circuit Court of Appeals there held that even assuming the services to be part of transportation:

> "The appellants did not, as they contend, suffer damages in the entire amount paid, but only in so far as the amount charged exceeded a reasonable rate for the services rendered." (p. 102.)
>
> * * * * *
>
> "The determination of damages in the instant case involves a finding of a reasonable rate, and the Court will not determine that question without a prior finding by the Commission." (p. 103.)

The same rule applies here; the determination of the complaint would require rate-making, and that is peculiarly the function of the Interstate Commerce Commission.

The foregoing discussion of the issues of this case has been rendered necessary by petitioner's claim that the decision below is in conflict with the cases cited on pages 20 and 21 of the petition where preliminary resort to the Commission, under the circumstances of those cases, was held to be unnecessary. The fallacy of this argument is that in none of those cases were there any such administrative issues as are presented in this complaint. In none of those cases was the plaintiff seeking a change in an established railroad practice for the future, and in none did the determination of damages for the past require a finding of the reasonableness of the rate charged. Nor was there any need in those cases to pass upon the scope of transportation or the adequacy of the delivery services and facilities. There is no such simple situation here presented as there was in those cases, and they do not conflict with the decision below.

Petitioner also urges that the decision of the Circuit Court conflicts with *Galveston, Harrisburg and San Antonio Ry.* v. *Wallace*, 232 U. S. 481 (1912), and *Atlantic Coast Line Railroad Co.* v. *Riverside Mills*, 219 U. S. 186 (1911). (Petition, p. 17.) In both of those cases the goods shipped had been lost and the suits were to recover their value. They were cited to the Circuit Court in connection with petitioner's argument that this "is the simplest 'loss and damage' suit imaginable." The contention was rejected because, as the Circuit Court stated: "it is obvious that the instant case is not a mere 'loss and damage suit.'" (R. 82.) In the complaint, there is no allegation that the livestock were lost, damaged or injured. Instead, the petitioner is here making a direct attack upon the long established delivery practice and seeks an order changing that practice for the future and granting damages for the past. (R. 21.) There is no comparison between such a suit and an action for mere loss and damage, and there is no con-

flict between the decisions that suits for loss and damage may be heard in the courts in the first instance and the decision that the issues presented by this complaint require preliminary resort to the Commission.

Mention should also be made of petitioner's reliance upon its contention that no violation of the Interstate Commerce Act is alleged in the complaint. If this argument means that there is no express reliance upon the Act in the complaint, the answer is that there is such express reliance and citation of the section of the Act relied upon. (R. 7, par. 6.) Even were this not the case, the question at all times, as the Circuit Court held, is one not of form but of actuality. (R. 82.) If the established practice of making deliveries at the Union Stock Yards, by which the line-haul carriers' responsibility terminates at the unloading pens, is not, in the words of Section 1(6) of the Interstate Commerce Act, both "just and reasonable" and is not all that is "necessary or proper to secure the safe and prompt * * * delivery of property," then there is a violation of the Act. On the other hand, if it is "just and reasonable" and is all that is "necessary or proper," then plaintiff has no complaint on any theory. As this Court held in *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482, 485 (1928): "The law exacts only what is reasonable from such carriers. The reasonableness of the rule adopted by the carrier is a matter for the Commission."

THE INTERPRETATION OF THE PLEADINGS.

Much of the petition and the accompanying brief is devoted to an argument directed solely to an interpretation of the pleadings. It is insisted that the courts below should have read the complaint to mean that Armour did not elect to have these shipments delivered at the public stockyards known as the Union Stock Yards, but consigned them for delivery either at those yards or elsewhere. Even under

that construction of the pleadings there would remain the administrative issues discussed above requiring preliminary resort to the Commission. The fact is, however, that the complaint cannot be given that meaning, as both courts below have held.

Petitioner seeks to obtain a different interpretation of the complaint from that made below, in order to distinguish the case from this Court's adverse decision on the merits in the *Hygrade* case, *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935) and from the Commission's adverse decision in *Swift & Company, et al.* v. *Alton Railroad Company, et al.*, 238 I. C. C. 179.) (Appendix, this brief.) It takes the position that those cases are distinguishable notwithstanding the fact that in the Circuit Court petitioner admitted that the issues of the *Hygrade* case were identical with those here, arguing that "it is apparent that plaintiff here demands no more than the Commission [in its decision in the *Hygrade* case which was set aside by this Court] had already found to be reasonable, at these same yards, from these same defendants." (Appellant's Supplemental Brief in Circuit Court, p. 25.) And in its petition for rehearing in the Circuit Court, referring to the decision of the Commission in the *Swift* case, petitioner stated: "Since the said decision of this Court, the Interstate Commerce Commission has fully considered and decided, the very administrative question referred to by the Court." (R. 88.)

Examination of the complaint will show that the Circuit Court was not only justified in rejecting the interpretation which petitioner urges but could have reached only the conclusion which it expressed as follows: "In fact, to give heed to the contention here is tantamount to our giving Armour permission to alter or modify the true character of the complaint. This we cannot do." (R. 92.)

It is plain from the terms of the complaint and attached

exhibits that the animals were and are being consigned by Armour for delivery at the Union Stock Yards, and that no request has been made for delivery at any other place. For example, the complaint states expressly that Armour has

> "* * * sought *only* to be permitted to take possession of its shipments of livestock at the unloading pens used by the Defendants as their depot or station *in the Union Stock Yards, Chicago, Illinois,* or at whatever point *therein* tender of said livestock was made and thence *to remove* said shipments of livestock to a public street, or to such other point *off the premises of said Stock Yards Company,* * * *." (R. 16, par. 24.) (Italics added.)

Similarly, in paragraph 4 of the complaint, petitioner defines its various references in the complaint to the "station or depot at Union Stock Yards, Illinois" as meaning the unloading pens and other facilities of the Stock Yards Company. After describing the facilities used in the unloading and delivery of all shipments here involved, the complaint continues as follows:

> "For many years, *the facilities of the Stock Yards Company,* above described, have been designated and used by each of the Defendants as their *station or depot, known as Union Stock Yards,* in the City of Chicago, Illinois, for the delivery of livestock consigned to commission merchants, packers and others buying, selling, or receiving livestock at, to or from Union Stock Yards * * *." (R. 6.) (Italics added.)

Furthermore, the Uniform Live Stock Contract which Armour attached to its complaint as evidencing the contracts made with the carriers provides that "the carrier agrees to carry to its *usual* place of delivery at said destination." (R. 23.) As shown above, the complaint establishes expressly that the "usual place of delivery" of these shipments to the Union Stock Yards was the facilities of the Stock Yards Company "known as Union Stock Yards, in the City of Chicago, Illinois" (R. 6), and that Armour

"contracted * * * for the transportation * * * and for delivery of such shipments to the Plaintiff, as consignee, at Union Stock Yards, Illinois." (R. 9.)

Similarly, petitioner's prayer for a mandatory injunction changing the delivery practices for the future asks that the defendant carriers be required to provide "for removal of its livestock from the unloading pens of the Defendants, or from such other point *in said station* where delivery may be tendered to Plaintiff, *at the Union Stock Yards* in Chicago, Illinois, * * *." (R. 21.)

Finally, in its prayer for a decree adjudging the duties of the carriers in respect to delivery, Armour describes the shipments as being those "consigned to it at Union Stock Yards, Illinois" (R. 21) which is the ' station or depot" defined at the outset of the complaint as the facilities of the Stock Yards Company. As held by the Circuit Court, petitioner's argument is merely an attempt to alter the complaint by "interpretation."[1] The complaint itself establishes that the shipments were consigned for delivery at the Union Stock Yards.

The petition contains several paragraphs at pages 17 and 18 purporting to be statements of what the Circuit Court held, accompanied by the citation of cases alleged to be in conflict with the Circuit Court's decision as so stated. The statements of the holding are quite inaccurate, since

1. To avoid misunderstanding, it should be noted that at frequent places in the petition and accompanying brief petitioner states the complaint as if it read the way petitioner's rejected interpretation would have it read. For instance, in the summary of the complaint, at the outset of the petition, petitioner states that it desired delivery "either at the public stock yards 'or at such other point at which delivery was tendered.'" (Petition p. 3.) There is no such reference to "the public stock yards" in the complaint and the alternative, as clearly stated in paragraph 24 of the complaint, quoted above, was for delivery "at the unloading pens used by the defendants 'as their depot or station in the Union Stock Yards, Chicago, Illinois, or at whatever point *therein* tender of said livestock was made.'"

they are set forth as if the Circuit Court had adopted petitioner's interpretation of the complaint where in fact that interpretation was argued to the Court in the petition for rehearing (R. 88-89) and expressly rejected in the opinion denying that petition. (R. 91.) The cases cited in that part of the petition as conflicting with the alleged holdings of the Circuit Court are the ones discussed above at pages 9 and 15. They not only do not conflict with the decision here, but directly support the principle that the issues of the complaint require preliminary resort to the Commission.

The remaining cases which are alleged to conflict with the decision here are *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662 (1915) and *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516 (1939) (Petition p. 19). These cases are cited as authority for petitioner's contention that the Commission's decision in the *Swift* case (Appendix, this brief) eliminates the need for preliminary resort here. In those cases a rate had been held by the Commission to be unreasonable. Here the Commission's ruling is exactly opposite, namely, that the practice assailed by the packers was and is reasonable and proper. That decision is binding upon all parties thereto including Armour, unless set aside in proper proceedings upon review in the courts.

It may be noted that Armour seeks to use that decision of the Commission as a substitute for the preliminary resort which is necessary on the administrative issues here presented but at the same time urges that the decision of the Commission, which was adverse to the packers, does not apply here. It is said that the Commission's decision involves "the same subject matter (but not the same factual or contractual status)" (Petition p. 19). Thus petitioner seeks to avail itself of the fact that the issues have been decided and at the same time to avoid

the consequences of their having been decided adversely by arguing that the facts were different.

We submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

The following appendix consists of a copy of the decision of the Interstate Commerce Commission in *Swift & Company, et al.* v. *Alton Railroad Company, et al.*, 238 I. C. C. 179 (April 8, 1940), together with a copy of the certificate of the Clerk of the Circuit Court of Appeals stating that the *Swift* decision was made part of the record herein.

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INTERSTATE COMMERCE COMMISSION

No. 27862

SWIFT & COMPANY ET AL. v. ALTON RAILROAD COMPANY ET AL.

Submitted June 21, 1939. Decided April 8, 1940

1. Transportation of direct shipments of livestock consigned to complainant at the Union Stock Yards, Chicago, Ill., found to be completed when the livestock is placed in the unloading pens at the Union Stock Yards. Yardage charges assessed by the Union Stock Yards & Transit Company of Chicago on direct shipments of livestock transported to the Union Stock Yards for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, found not subject to the jurisdiction of the Commission.
2. Defendants' failure to afford egress for direct shipments of livestock transported to the Union Stock Yards found not to have resulted or to result in an unreasonable practice.
3. Complaint dismissed.

R. D. Rynder for complainants.

Paul E. Blanchard for intervener.

H. R. Park for interested party.

Douglas F. Smith, *Kenneth F. Burgess*, and *Robert Thomas* for defendants.

Report of the Commission

Splawn, *Commissioner:*

Exceptions were filed to the examiner's report by complainant; defendants replied; and the parties were heard in argument.

Complainants are Swift and Company, and G. H. Hammond Company and Omaha Packing Company, wholly owned subsidiaries of Swift & Company. They, with the exception of G. H. Hammond Company, are engaged in the packing-house business and operate packing plants for the processing of livestock at Chicago, Ill. G. H. Hammond Company formerly operated a packing plant, but since the complaint was filed operation of the plant has ceased. Complainants' plants are located adjacent to the Union Stock Yards in Chicago, owned and operated by The Union Stock Yard and Transit Company of Chicago, hereinafter referred to as the Yard Company. The defendants are common carriers by railroad engaged in the transportation of livestock to Chicago. The Yard Company is not

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named a defendant. Although livestock consigned to G. H. Hammond Company and Omaha Packing Company at the Union Stock Yards has arrived at those yards in the past, the volume of shipments so consigned has been small. The bulk of the traffic about which complaint is made has been consigned to Swift & Company. For convenience, Swift & Company will be referred to as if it were the only complainant.

It is alleged, in substance, by complaint filed September 20, 1937, that defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards to the nearest public street, in connection with direct shipments of livestock consigned to complainant, free from any charge other than the line-haul rate, has resulted and results in an unreasonable practice. We are asked to require defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock Yards to the public streets free from the payment of any charges other than the line-haul rate. We are also asked to award reparation to each complainant for charges paid by reason of the alleged unlawful practice during the period of 2 years preceding the filing of the complaint and during the pendency of this proceeding.

Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief. The proceeding in the State court was subsequently removed to the United States District Court for the Northern District of Illinois, Eastern Division, and motions by defendants to dismiss were sustained May 31, 1939.

The situation complained of may be described as follows. A carload of livestock is shipped from a point in Iowa, consigned to Swift & Company at the Union Stock Yards in Chicago. This is known as a direct shipment, as distinguished from a shipment consigned to a commission merchant at the stockyards for sale. Under the provisions of section 15 (5) of the Interstate Commerce Act, the transportation includes delivery of the livestock into suitable pens at the stockyards at the line-haul rate without extra charge to the shipper or consignee. The livestock is transported by defendants to unloading platforms on the property of the Yard Company. Upon arrival of the car at the unloading platform, the car door is opened by employees of the Yard Company and the livestock is driven by employees of the same company through chutes into unloading pens adjacent to the unloading platforms. The unloading platforms, chutes, and pens are owned by the Yard Company. If employees of

Swift & Company are at the unloading pens when the animals are placed therein, the animals are driven by Swift & Company's employees from the unloading pens through the property of the Yard Company to Swift & Company's plant located outside of the stockyards. If employees of complainant are not at the unloading pens when the animals are placed therein, and if the volume of livestock arriving at the unloading pens is sufficient to necessitate immediate removal of the animals from the loading pens to holding pens located throughout the yards, the animals are driven from the unloading pens to holding pens in the stockyards by employees of the Yard Company, and are later driven from the holding pens through the Yard Company's property to Swift & Company's plant by employees of the latter company. Irrespective of whether possession of the animals is taken at the unloading pens or at the holding pens by Swift & Company's employees, Swift & Company is required to pay a yardage charge on each animal. This yardage charge is assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture.

Complainant's claim is that delivery of the livestock into suitable pens at the stockyards includes delivery to it in such manner as to permit the animals to be removed by its employees from the unloading pens to the nearest public street without the payment of a yardage charge. It seeks to be relieved of the payment of the yardage charge on shipments of livestock consigned to it at the Union Stock Yards.

A complaint containing issues substantially similar was considered by the Supreme Court in *Atchison T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, in which our order in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, was set aside. Complainant contends that it is presenting a case different from that considered and decided in the above proceedings.

The Union Stock Yards, owned and operated by the Yard Company, is located in Chicago and is the terminal at which the preponderant amount of the livestock transported by rail to Chicago is received. It is the largest livestock market in the United States and is the only public market for the sale of livestock in Chicago. Immediately west of the Union Stock Yards is an area commonly known as Packingtown. The plants of Swift & Company and other packers are located in this area. It is physically impossible to remove livestock from the unloading pens in the stockyards to complainant's plant or to public streets except by use of the Yard Company's property. The Yard Company, with respect to part of its business, is a common carrier of freight by hire, is engaged in interstate com-

merce, and is subject to the Interstate Commerce Act.[1] It is also a stockyard owner as that term is defined in the Packers and Stockyards Act.[2] As such, it is engaged in operating a public stockyard. In the operation of its business as a stockyard owner, it is subject to the jurisdiction of and regulation by the Secretary of Agriculture.

The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable on all livestock received at the Union Stock Yards. These charges are 45 cents per head on cattle, 35 cents on calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and are assessed and collected by the Yard Company on every animal unloaded from railroad cars at the stockyards.

With respect to direct shipments, these charges are compensation for services performed by the Yard Company after the stock is placed in unloading pens and for the use of its facilities, such as holding pens, alleys, and ways in the stockyards. With respect to shipments consigned to commission men, the yardage charges cover, in addition to the services on direct shipments, use of the Yard Company's facilities pending the sale of the livestock, and the use of facilities for removal of the stock from the yards after it is sold.

The tracks of the line-haul carriers do not reach the stockyards, which are served exclusively by tracks owned by the Yard Company and leased by it to The Chicago River and Indiana Railroad Company. By authority of trackage rights and the use of their own crews and power, all livestock consigned for delivery at the stockyards is placed by the trunk lines on the tracks adjacent to the unloading platforms. When the livestock reaches the unloading platforms, no one is permitted by the Yard Company to handle the animals except employees of that company. This is necessary for the efficient and orderly handling of the large number of shipments arriving at the yards.

The bulk of the movement is received at the yards during the first days of the week, and approximately three-fourths of the daily movement is unloaded between 3 and 8 a. m. In some instances, immediate removal of the animals from the unloading pens is necessary to preserve an even flow of livestock from the cars into the yards.

During the more than 70 years of its existence the Union Stock Yards has been the principal terminal at which livestock consigned

[1] *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Livestock Loading and Unloading Charges*, 52 I. C. C. 209; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330; *Cancelation of Livestock Services at Chicago*, 227 I. C. C. 716; *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213.

[2] Sections 201 to 229 of the Packers and Stockyards Act, title 7, U. S. C. A.

to Chicago has been received. Since the beginning of its operations, the Yard Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises, irrespective of whether the shipments were direct shipments to a packer or whether they were consigned to a commission merchant for sale. Prior to 1927 the number of direct shipments received at the Union Stock Yards by complainant was relatively small. About that time, various conditions combined to make it necessary for the packers, including complainant, to purchase livestock in greater quantities at country points, and to have such shipments consigned to them at Chicago. By 1929 the number of direct shipments to complainant at the stockyards grew to a substantial amount. This condition continued for several years until complainant began to consign its direct shipments to the plant of its subsidiary, Omaha Packing Company, located approximately 2 miles from the Union Stock Yards. Thereafter the number of direct shipments consigned to complainant at the stockyards decreased. During the first 4 months of 1938, 18 cars of direct shipments were received by complainant at the Union Stock Yards. At the hearing herein it was stated that practically all of complainant's direct shipments are being made to the plant of the Omaha Packing Company and that no such shipments are being received at the Union Stock Yards. By having its shipments consigned to the plant of the Omaha Packing Company, complainant is relieved of the payment of the yardage charge. The stock received at the plant of the Omaha Packing Company is transported by motor-truck over the streets in Chicago to complainant's plant.

In May 1933 complainant advised the traffic officers of defendants and the Yard Company that it was prepared to accept direct shipments of livestock at the reasonable and proper pens of each defendant at the Union Stock Yards, and to remove the livestock to its own plants within a reasonable time without other use of the Yard Company's facilities; and that on and after May 25, 1933, it would refuse to pay any yardage charges on direct shipments consigned to it at the Union Stock Yards. The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company would not permit livestock consigned to complainant to be delivered to it or its employees. Complainant then notified defendants that on and after May 25, 1933, the Yard Company had no authority to accept or receive livestock for complainant's account; that any delivery by defendants of complainant's livestock to the Yard Company for unloading and delivery, except as defendants' agent, would constitute a conversion of cc -

plainant's property; and that payment of yardage charges to the Yard Company made to gain possession of its property would be made by complainant under protest.

As a result of subsequent correspondence between complainant and the Yard Company, the Yard Company agreed to accept payment of the yardage charges with the understanding that such payments would be made under protest. It was also agreed that it would be understood that, with respect to each direct shipment made thereafter, complainant had made a physical demand for delivery and the right to promptly remove the stock from the premises of the Yard Company without the payment of yardage charges, and that the demand had been refused by the Yard Company. Each of the defendants refused complainant's demands. Later, in September 1935, the demands were repeated in letters sent to the defendants and were again refused.

Since May 25, 1933, in each instance in which complainant has paid yardage charges on direct shipments it has done so under protest. At stated intervals since the above date, it has rendered bills against each defendant for the amount of yardage charges paid to the Yard Company under protest.

There is no dispute with respect to the character of service in the stockyards required on direct shipments. All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees. Complainant does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.

Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge. Several suggestions as to means of egress were made. It was emphasized, however, that complainant is not demanding egress at any particular points but simply egress to a public street or highway via the shortest or most convenient way, to be designated by defendants. Because of the physical situation at the Union Stock Yards, defendants

could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company.

As hereinbefore stated, since the establishment of the stockyards more than 70 years ago, the Yard Company has collected a yardage charge on every animal unloaded from a railroad car at the Union Stock Yards, regardless of whether the stock was consigned to a packer for immediate slaughter or to a commission merchant for sale. This custom and practice not only has prevailed at Chicago but was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice. During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company. These facts are shown in copies of the following documents which were received in evidence: Agreement dated January 15, 1892, between the Chicago Junction Railway and Union Stock Yards Company of New Jersey, a holding company which owned practically all the stock of the Yard Company, and Philip D. Armour and others, Nelson Morris and other, and Gustavus F. Swift and others; a similar agreement of the same date, between the New Jersey Company and certain smaller packers; complaints filed in 1891 by Swift & Company, Armour & Company, and other packers against the Yard Company in the circuit court of Cook County, Ill.; answers to said complaints filed by the Yard Company; stipulations dismissing the above complaints; and extracts from a report of the Federal Trade Commission on the meat-packing industry, dated June 28, 1919.

Complainant objected to the receipt in evidence of the above-described documents. Pursuant to complainant's request, a further hearing was held to afford it an opportunity to introduce evidence relating to the documents. At the further hearing evidence bearing on certain matters embraced in the documents was introduced on behalf of complainant. At the conclusion of the further hearing before the examiner, complainant's counsel moved that the documents and the evidence bearing thereon be stricken from the record. The motion is overruled.

Since 1865, when the Yard Company began operations, there has been a line of demarcation between the services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the yards. The

amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers. The practices described had been in effect for practically 25 years, when certain transactions described in the documents referred to were entered into by the Yard Company and certain packers, including complainant and intervener, under which the packers received participation in the profits from the Yard Company's operations.

The evidence shows that at some time prior to 1890 the packers had threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. This was a matter of concern to the Yard Company because its revenue was received in large measure from the charges collected on livestock slaughtered by the packers. The packers had acquired a large tract of land in Indiana to be used as a new site for their plants. They had also purchased property known as the "Central Stock Yards," near the property of the Yard Company, and had erected on these premises platforms, pens, sheds, and sidings "for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago or directly consigned to them, and thereby avoiding the payment of yardage charges" to the Yard Company. They had also demanded, in complaints filed in Illinois, that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the Central Stock Yards.

The steps taken by the packers to relieve themselves of the payment of yardage charges resulted in the execution of the contract of January 15, 1892. By the terms of this contract, the packers agreed to convey to the New Jersey Company, owner of the Yard Company, the Indiana site and the Central Stock Yards; to dismiss the suits filed in the Illinois court, and to refrain from filing similar suits during the life of the agreement, which was for 15 years; to continue their business at Packingtown for 15 years from July 1, 1891; "to guarantee that any and all live stock slaughtered by them on their premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, and to pay the usual yardage charge therefor;" to guarantee that the Yard Company "shall receive and collect from its yardage charges on cattle and livestock owned or purchased by or conveyed to said parties of the second part (the packers) and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years," and to make up any deficiency in that amount. The packers also agreed that as long as the Yard Company conducted its busi-

ness at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.

The consideration for the above covenants by the packers was the receipt by them of income bonds of the New Jersey Company in the amount of $3,000,000. Complainant received approximately one-third of these bonds which were subsequently redeemed by the New Jersey Company.

It appears that during the existence of the agreement described, the packers, including complainant, agreed to pay the yardage charges, participated in the receipts of the Yard Company from said charges, and considered the assessment of such charges on their shipments a matter between themselves and the Yard Company. The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned.

The agreement of 1892 expired in 1907, except for the covenant by the packers not to use any other stockyards for the receipt of their livestock so long as the Yard Company maintained its business in Chicago. The report of the Federal Trade Commission shows, however, that stockholders of the New Jersey Company were informed that the packers were still threatening to move their plants from Chicago and that some arrangement must be made to hold them. It is shown that complainant expected to receive a share of the Yard Company's earnings as late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. The report definitely shows, however, that J. O. Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.

The important fact is that, after the agreement of 1892 expired, the packers continued to pay the yardage charge, made no complaint to the railroads against its assessment, and for several years attempted to share in, and one of them actually did share in, the revenues received by the Yard Company. In an appearance before a Congressional committee in 1919, L. F. Swift, an official of complainant, testified as follows:

I know that we wanted this arrangement (under the 1892 contract) to continue. * * * He (Prince) told me if I would keep still and not press the matter—not move our plant or threaten to move it, keep still, I might get something after a while.

The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Company and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.

The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services. The Yard Company furnishes the services and facilities for which the yardage charges are assessed. Prior to 1921 it fixed the measure of the charges, and since that date it has performed the same function under the supervision of the Secretary of Agriculture.

For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago.

Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there.

An analysis of the billing of 3,061 cars, comprising direct shipments of livestock to complainant, unloaded at the Union Stock Yards from January 1935 to March 1938, both inclusive, shows that 84.4 percent were consigned by representatives of complainant to the Union Stock Yards, and that the remaining 15.6 percent were delivered to the stockyards, although delivery at that point was not specified in the livestock contract. Under the terms of the contract, complainant could have required delivery of the 15.6 percent of shipments either at the stockyards or on defendants' team tracks, but complainant never requested delivery of those shipments to any point other than the Union Stock Yards.

The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge.

Issues substantially similar to those here presented have been considered and decided in *Hygrade Food Products Corp.* v. *Atchi-*

son, T. & S. F. Ry. Co., supra, and *Atchison, T. & S. F. Ry. Co. v. United States, supra*. In the complaint in the above proceeding filed against both the line-haul carriers and the Yard Company, it was alleged that the practice of the line-haul carriers and the Yard Company in making the stockyards their terminal for delivery of livestock, pursuant to an arrangement by which the Yard Company imposed a yardage charge, was an unjust and unreasonable practice. We found that livestock consigned to complainant at the stockyards was not subject to yardage charges in instances where delivery of stock was taken by complainant at the unloading pens. Upon appeal, the Supreme Court reversed our finding, and, in its opinion, stated:

> Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into situable pens as is now required by section 15 (5). * * * The statute cited clearly discloses the intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

It is to be noted that the Supreme Court stated that, in respect of the particular shipments involved, transportation ended at the unloading pens.

The Court also found that section 15 (5) of the Interstate Commerce Act "left undisturbed the Yard Company's practice of making a charge for livestock received," and that the Packers and Stockyards Act, enacted about a year later, defined the practice of the assessment of yardage charges as a stockyard's practice, and subjected the services for which the charges were made to the jurisdiction of the Secretary of Agriculture.

Complainant here contends that the issue in this proceeding differs from that decided in the *Hygrade case*; that the complainant in the *Hygrade case* was using runways, alleys, an overhead viaduct, and a tunnel belonging to the Yard Company; and that it was, in effect, demanding that the carriers provide a delivery beyond their own terminals into the Hygrade plant, whereas complainant here is demanding only egress from the unloading pens to the nearest public street. The alleged difference is not one of substance, because the evidence in this proceeding shows that alleys, ways, and, in some instances, overhead viaducts belonging to the Yard Company must be used to remove animals from the unloading pens to the public streets. In the *Hygrade case* it was shown that possession of a substantial portion of complainant's shipments was taken by complainant at the unloading pens, and the Supreme Court stated that, with respect to such shipments, transportation ended at the unloading pens.

Reference is made by complainant to certain language[3] of the Court as a clear intimation that the consignee of the livestock was and is entitled to a mere egress and a mere way out of the stockyards. Such an interpretation of the language referred to is inconsistent with the statement of the Court that "Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5)." In the statement referred to by complainant, the Court was contrasting the situation at public stockyards with the situation at livestock terminals other than public stockyards, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street. The evidence here conclusively shows that there is no essential difference between the routes and the services required from the unloading pens to plants outside the stockyards and a way out to the public highways. In either case, property of the yard company must be used.

Emphasis is placed by complainant on the provisions of the act which define "transportation" and to the inclusion in that term of the word "delivery," and it is contended that our jurisdiction is coextensive with transportation as defined in section 1 (3) of the act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

The provision of the act which differentiates between livestock and other carload freight with respect to the unloading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section. The material portion of the amendment is as follows:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the

[3] "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yard Company's properties for this service from mere egress such as is included in the transportation of live stock to destinations other than public stockyards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

There is nothing in the amendment which imposes an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable pens to the boundary of the Yard Company's property. It would appear that had such been the intention of Congress, the words "delivery at public stockyards of inbound shipments into suitable pens" would have read "into suitable pens and from those pens to the boundary of the stockyards." The amendment indicates an intention by Congress to constitute the pens as the point where the duties of the defendants terminate. The word "suitable" is descriptive of the character of the pens into which the stock must be unloaded and does not, under a reasonable interpretation of the language used, refer to the character of egress from the pens to the boundary of the yards.

Complainant takes the position that there is nothing in the language of section 15 (5) that narrows or restricts our jurisdiction; that the provision is remedial and is entitled to a liberal interpretation that fairly accomplishes its purpose; that under such an interpretation it would seem that a pen from which it is impossible for a consignee, who is on hand when his stock is unloaded, to take his shipments without extra charge cannot be a suitable pen; that there is nothing in the provision to indicate that Congress meant to take away the opportunity to obtain complete possession of the property at destination; and that the contention that our jurisdiction ends at the unloading pens comprehends the proposition that defendants' common-law duty has been reduced by section 15 (5).

The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in *Adams* v. *Mills*, 286 U. S. 397. For almost 50 years prior to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier,[4] it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its unloading charge

[4] *United States* v. *Union Stock Yard & Transit Co., supra.*

from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted.

The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

> I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of taking property at the point of origin and *delivering it to the point at which it is to leave the car.* [Emphasis supplied.]

Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

> It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *. [Emphasis supplied.]

Evidence of the intent of section 15 (5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards. No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge.

Additional evidence of the intent of section 15 (5) is to be found in the conduct of complainant and other packers since its enactment. When the amendment was proposed, the yardage charges had long been a matter of concern to the packers. They had sought to avoid the payment of the charges by threatening to move their plants and by acquiring the Central Stock Yards; they had sued the Yard

Company to compel it to permit delivery of direct shipments over its rails at the Central Stock Yards; and, upon receiving an interest in the Yard Company's business under the contract of 1892, they gave up the Central Stock Yards and continued to pay yardage charges. For a number of years after expiration of the contract of 1892 they had sought to have the arrangement under which they participated in the Yard Company's profits renewed. The acquiescence by the packers in the assessment of the yardage charge is evidence that they did not believe that section 15 (5) could reasonably be given the meaning they now urge.

The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under section 15 (5) the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 percent of the voting stock. It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges were being assessed on direct shipments. The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to.

Direct shipments of livestock transported by rail to packers at Chicago have exceeded 30,000 carloads annually for several years, as compared with a total annual average rail movement to the Union Stock Yards of 94,629 cars. The shift from producers' consignments to direct shipments is rapidly increasing. The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago.

Reference is made both by complainant and defendants to proceedings before us in which the question of yardage charges has been considered. An examination of the cases cited shows that in only two of them has the question here presented been determined.

The first case, after the enactment of section 15 (5), in which the question was raised was *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co., supra.* There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards

were beyond our jurisdiction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens.

The other case in which an issue similar to the issue herein was considered was *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co., supra.* There complainant's employees had taken possession of approximately 15 percent of their direct shipments at the unloading pens of the Union Stock Yards in Chicago and had driven such shipments through the yards to its plant. In such instances, we found the assessment of yardage charges unlawful. As hereinbefore shown, the Supreme Court stated that, with respect to the shipments in question, transportation ended when the animals were placed in the unloading pens.

Since the decision of the Supreme Court in the *Hygrade case*, the Court and we have interpreted that decision as holding that transportation of direct shipments of livestock to a public stockyard terminates at the unloading pens. See *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470; *Livestock to or from Union Stock Yards, Chicago*, 222 I. C. C. 765.

In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary precribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States, supra*; *Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary.

Defendants contend that we cannot enter an effective order in this complaint granting the relief sought, because the Yard Company is an indispensable party and is not named a defendant. It points out that the Yard Company is a common carrier subject to the act and is solely responsible for the practice complained of; that it levies, collects, and retains for itself the yardage charge; that it denies use of its property unless the yardage charges are paid to it; and that it alone can modify or permit the modification of the charges and practices complained of. In view of our findings herein, it is unnecessary to determine this question.

The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. That does not mean

delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.

The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15 (5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own.

In the *Hygrade case* the Supreme Court stated that, with respect to shipments of which the complainant took possession at the unloading pens, the transportation ended at the unloading pens. There is no difference in principle between the issue in the *Hygrade case* and the issue in this proceeding. The yardage charge is collected on complainant's shipments when it takes possession of the animals at the unloading pens, and in the *Hygrade case* it was collected on that portion of the shipments of which possession was taken at the unloading pens. With respect to such shipments, the Supreme Court stated that the obligation of the line-haul carriers ceased when the animals were placed in the unloading pens.

We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this report,

transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

The complaint will be dismissed.

ALLDREDGE, *Commissioner*, dissenting:

In my judgment the report in this case misconstrues the opinion of the Supreme Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193. Reliance is placed upon one statement contained therein to the effect that transportation of livestock destined to public stockyards ends upon the unloading of the stock into suitable pens. A correct construction of the opinion of the Court is, I believe, that the Court did not consider that the question of free egress from the stockyards was presented for decision, that the Court did not itself undertake to say that the transportation ended with delivery into unloading pens, and that it set aside the findings in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, not because they were wrong in principle, but because they were technically inadequate.

Neither am I able to find anything in the Court's opinion revealing a purpose to set aside the principles enunciated in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, relied upon by us in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, *supra*, and likewise specifically applicable to the facts and circumstances disclosed in the instant proceeding. It was there said (pages 135–136):

> A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

Consistent with the principles set forth in the foregoing excerpt from the opinion of the Court I think we should here find that defendants' transportation obligations do not end with delivery of the stock into unloading pens, and that it is their duty under the law to afford through their agent, the stockyard company, access to the property of the latter for removal of their livestock therefrom, within a reasonable time after it has been placed in unloading pens, and without the payment of any special toll or charge, and that the transportation does not end until the obligations above set forth have been fulfilled.

CHAIRMAN EASTMAN and COMMISSIONER AITCHISON did not participate in the disposition of this case.

U. S. GOVERNMENT PRINTING OFFICE: 1940

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 179 to 198, inclusive, contain a true copy of a decision of the Interstate Commerce Commission decided April 8, 1940 in Number 27862, Swift & Company *et al, vs.* Alton Railroad Company *et al,* as the same appears on pages 31 to 59 inclusive of the Petition of Plaintiff Appellant for Rehearing and Motion for order remanding the cause to the Lower Court for Trial etc. filed in this Court on April 19, 1940 and which was not included in the record prepared by the Clerk of this Court for use in connection with a petition for a writ of certiorari in the case of

Cause No. 7030

Armour and Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.,*
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Fifth day of September, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF ON BEHALF OF HOLMAN D. PETTIBONE, TRUSTEE OF CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILROAD COMPANY; PATRICK H. JOYCE AND LUTHER M. WALTER, TRUSTEES OF CHICAGO GREAT WESTERN RAILROAD COMPANY; AND NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, RESPONDENTS, IN OPPOSITION TO PETITION FOR CERTIORARI.

MEYER MORTON,
ELMER W. FREYTAG,
BRYCE L. HAMILTON,
FRANK H. TOWNER,
Counsel for said Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner.

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents

BRIEF ON BEHALF OF HOLMAN D. PETTIBONE, TRUSTEE OF CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILROAD COMPANY, PATRICK H. JOYCE AND LUTHER M. WALTER, TRUSTEES OF CHICAGO GREAT WESTERN RAILROAD COMPANY, AND NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, RESPONDENTS, IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinions in Courts Below.

As appears at page 3 of the brief in support of the Petition for Certiorari, the opinion of the District Court herein is reported at 27 Fed. Supp. 625, and the opinion of the Circuit Court of Appeals at 111 Fed. (2) 913.

Statement of the Case.

The Petition for Certiorari and brief in support thereof present this case as being an ordinary suit to recover damages arising out of the misdelivery of livestock. Thus, at page 2 of the Petition it is said that the case involves the jurisdiction of the Federal District Courts to hear and decide an action against a railroad for damage arising from wrongful delivery of property. The statement of facts made at pages 2 to 4 of the Petition is greatly abbreviated, and is calculated to show that Petitioner's Complaint filed in the lower court (R. 4-22) only asked for damages resulting from the misdelivery of livestock belonging to it.

At page 7 of the Petition the issue in the case is similarly stated. In the statement of questions presented, at pages 8 and 9 of the Petition, all of the questions stated relate to a railroad's liability for failing to make delivery of property, and to a court's jurisdiction to hear a suit to recover damages arising therefrom. The brief in support of the Petition proceeds upon the same theory. All this material creates a false conception of the case actually made by Petitioner's Complaint.

This action was brought to recover certain yardage charges paid by Petitioner to the Union Stock Yard and Transit Company of Chicago (hereinafter called the "Stockyard Company") for the use of the facilities and property of the Stockyard Company by Petitioner's livestock consigned to it at the Stock Yards in Chicago. The general circumstances attendant upon the use of those facilities for delivery of livestock are fully set out in the decisions of this Court in *Adams et al.* v. *Mills*, 286 U. S. 397; *A. T. & S. F. Ry. Co. et al.* v. *United States*, 295 U. S. 193; and *Union Stock Yard and Transit Company* v. *United States*, 308 U. S. 213.

The allegations of Petitioner's Complaint may be briefly

stated. For many years Petitioner has owned and operated a meat packing plant adjacent to the Stock Yards in Chicago, which Stock Yards are owned and operated by the Stockyard Company (R. 4). Each of the Respondents herein owns or operates a line of railroad serving the Stock Yards (R. 4, 5). Each Respondent designates Union Stock Yards, Chicago, Illinois as being a station on its or their line of railroad, the station thus designated by each Respondent consisting only of facilities owned by the Stockyard Company at the Stock Yards and used in making deliveries of livestock consigned to parties located there (R. 6).

In the course of its business, Petitioner purchased and shipped to itself at the Stock Yards over the lines of Respondents, numerous shipments of livestock (R. 8, 9) which, upon arrival at the Stock Yards, were then unloaded and delivered to Petitioner (R. 10). In rendering the service, Respondents hauled the cars to the Stock Yards with their own power, and upon arrival the livestock was then unloaded by employees of the Stockyards Company through the use of the facilities owned by the Stockyards Company (R. 8). After unloading, the animals were put into pens of the Stockyards Company or were delivered to Petitioner and removed to its plant (R. 9, 10).

None of the Respondents own any unloading or storage facilities for livestock at the Stock Yards, and all animals consigned to that point were and are required to be unloaded, stored or handled through the use of or over facilities owned by the Stockyard Company (R. 7). The Stock Yards are public stock yards subject to the jurisdiction of the Secretary of Agriculture under the Packers and Stock Yards Act (7 U. S. C. A. Sec. 202) (R. 7) and the Stockyard Company is required to and does file with the Secretary of Agriculture its tariffs showing its charges for all stock yards services performed by it.

For the services performed by it on livestock con-

signed to Petitioner at the Stock Yards, each Respondent collected transportation charges from Petitioner in accordance with its tariffs on file with the Interstate Commerce Commission (hereinafter called the "Commission") or the Illinois Commerce Commission (R. 7). Out of the amounts thus collected Respondents paid to the Stockyard Company its charges for unloading the livestock, the assessment of these charges and their payment by Respondents being authorized by tariffs of the parties on file with the Commission (R. 8).

Under its tariffs on file with the Secretary of Agriculture (R. 11, 35, 36) the Stockyard Company also collected from Petitioner a yardage charge on such livestock (R. 14, 15), the yardage charge being compensation to the Stockyard Company for the use of its facilities and property by such animals after they were unloaded. Thus, Respondents' charges for transportation and the yardage charges of the Stockyard Company were paid by Petitioner, and the charges of the Stockyard Company for unloading the livestock were paid by Respondents. These practices have obtained for many years (R. 6, 8, 10, 11).

In 1933 Petitioner demanded the right to remove its livestock from the Stock Yards without payment of the yardage charges of the Stockyard Company (R. 11, 12) and served notice upon the Stockyard Company and Respondents that it would no longer pay to the Stockyard Company those yardage charges on livestock delivered to Petitioner through the Stock Yards. Upon the refusal of the Stockyard Company to release livestock consigned to Petitioner without payment of such yardage charges (R. 11, 35, 36), Petitioner agreed to pay the charges (R. 15) and thereafter brought this suit in the Circuit Court of Cook County (R. 3) seeking to recover all of the yardage charges which it had thus paid to the Stockyard Company and to secure a mandatory injunction requiring Respondents to make fu-

ture delivery of Petitioner's livestock to it at the Stock Yards without the payment by it of any charge in addition to that provided for in the tariffs of Respondents on file with the Interstate and State Commissions (R. 21).

Petitioner does not claim any physical damage to its livestock or that delivery of such livestock was not made to it at the proper destination. Nor is there any claim that the charges paid by Petitioner were improper in amount or that they were not contained in tariffs on file with the Federal and State Commissions or the Secretary of Agriculture. The claim actually made is that Respondents should have delivered the livestock at the Stock Yards under such circumstances that Petitioner would not have been required to pay the yardage charges of the Stockyard Company (R. 16, 17). This delivery could only have been accomplished through the payment of the yardage charges by Respondent, since delivery of livestock at the Stock Yards can only be made by using facilities of the Stockyard Company in addition to those used in unloading.

All charges of misdelivery and failure to make delivery, contained in the Complaint (R. 10, 13, 14, 15, 16, 17, 18, 22) are based upon the failure of Respondents to pay those yardage charges. Thus, the real questions presented for decision are whether the practices of Respondents in making delivery of the livestock at the Stock Yards were and are unreasonable, and whether the services of the Stockyard Company, for which it collected the yardage charges, were and are a part of the transportation of the livestock.

SUMMARY OF ARGUMENT.

(a) This case does not involve any question of loss of or damage to Petitioner's livestock. For this reason, decisions relating to that subject have no application.

(b) The real issues in the case are the reasonableness of Respondent's present practices with respect to the delivery of livestock at the Stock Yards, and the question of what is included within the transportation and delivery of that livestock. These questions will not be passed upon by a court in the absence of a prior adjudication by the Federal or State commissions.

(c) Even if Petitioner's complaint did not allege a violation of the Interstate Commerce Act, the courts would still not act in this case. The right to proceed herein does not result from a form of words.

(d) The complaint actually does allege a violation of the Interstate Commerce Act, in that the amounts sought to be recovered are said to be due Petitioner because of Respondents' failure to have on file a tariff justifying the collection of the amounts.

(e) Under the facts alleged in the complaint, Respondents could not have made delivery of Petitioner's livestock in accordance with the billing instructions without using the facilities of the Stockyard Company. Petitioner's method of consigning these shipments compelled a use of those facilities, with a consequent obligation to pay the charges of the Stockyard Company.

ARGUMENT.

THE DETERMINATION OF THE ISSUES PRESENTED FOR DECISION REQUIRES A DECISION ON THE REASONABLENESS OF RESPONDENT'S PRESENT PRACTICES, AND A DETERMINATION OF WHAT IS EMBRACED WITHIN THE SERVICE OF TRANSPORTATION AND DELIVERY OF PETITIONER'S LIVESTOCK BY RESPONDENTS. THE EXCLUSIVE PRIMARY JURISDICTION TO DETERMINE THESE QUESTIONS IS VESTED IN THE INTERSTATE COMMERCE COMMISSION AND THE ILLINOIS COMMERCE COMMISSION, AND THIS SUIT CANNOT BE MAINTAINED WITHOUT A SHOWING OF PRIOR RESORT TO THOSE COMMISSIONS.

Following the theory of the Petition, the brief in support of the Petition argues that since courts have primary jurisdiction to determine questions of loss and damage arising out of the misdelivery of or failure to deliver property, this action was properly brought in the courts; that this is demonstrated by the failure of the complaint to allege a violation of the Interstate Commerce Act; and that even if the complaint be held to allege the collection by Respondents of an overcharge, the courts still have jurisdiction. It is further argued that Respondents arbitrarily imposed upon Petitioner the obligation of paying the charges of the Stockyard Company by electing to make a delivery at the Stock Yards, although they could have made the delivery at other points whereby the charge would have been avoided.

(a) In view of the issues actually presented by Petitioner's complaint, it is unnecessary to consider the loss and damage decisions cited in the Petition (pp. 18, 19, 20-22) and supporting brief. For the purpose of this argu-

ment, it might be admitted that the general rule is that when a common carrier receives property for transportation, it has a legal obligation to deliver such property at the proper destination to the proper consignee. For the purpose of this argument, it might also be admitted that generally speaking, suits for loss, damage, injury to or misdelivery of property by common carriers are properly brought in the courts.

But the case made by Petitioner's complaint is not a case of that sort. The theory of the complaint is that Respondents did not fully discharge their duties with respect to the transportation and delivery of Petitioner's livestock in that the livestock were not delivered in such fashion that Petitioner was relieved of the necessity of paying the yardage charges of the Stockyard Company. The decision of this question requires a decision on the reasonableness of Respondent's present practices and a determination of what was included in the transportation and delivery of that livestock. Decisions in suits for loss, damage and misdelivery have no application to these questions.

(b) Generally speaking, the duty of loading and unloading carload freight rests upon a shipper or consignee. The contracts under which Petitioner's livestock were shipped so provided except in cases where the law or Respondent's tariffs provided otherwise (R. 29). But at the Stock Yards the practice has long been otherwise. *A. T. & S. F. R. Co. v. U. S.*, 295 U. S. 193, 198, 199. Prior to 1920, the unloading charge of the Stockyard Company was paid by the railroads voluntarily. Under Section 15(5) of the Interstate Commerce Act (49 U. S. C. A. Sec. 15(5)) the obligation to pay these charges was placed upon the railroads.

There still remained, however, the question whether the transportation obligations of the railroads extended beyond the unloading of inbound shipments of livestock, consigned to public stock yards, and their placement in suitable pens.

The argument over this question led to the decision in *A. T. & S. F. R. Co.* v. *U. S.*, 295 U. S. 193. The Interstate Commerce Act does not define transportation beyond providing, in paragraph 3 of Section 1 (49 U. S. C. A., Sec. 1(3)), that the term transportation shall include locomotives, etc. and all instrumentalities and facilities of shipment, and all services in connection with the receipt, delivery, etc. of property transported. Thus, while delivery is included in the term transportation, the statute does not say what is meant thereby.

It cannot be assumed that the obligation of Respondents to deliver Petitioner's livestock at the Stock Yards included an obligation to give a free delivery of that livestock through the use of the facilities of the Stockyard Company. No provision of the Interstate Commerce act imposes such an obligation upon Respondents, nor is it imposed by their contract of transportation. To determine what was properly included in the transportation and delivery of Petitioner's livestock at the Stock Yards, and whether Respondent's present practices are reasonable, requires a consideration of many intricate facts and circumstances in connection with the handling of the shipments. This determination is committed to the exclusive primary jurisdiction of the Federal and State Commissions.

The rule is that where an inquiry is essentially one of fact or requires consideration of intricate facts of transportation or customs or usage, the courts will not act in the absence of a prior determination by the Commission. In *G. N. Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, the question before this Court was the legal construction of a tariff. This Court held that under the circumstances there present a court would have jurisdiction, but took occasion to say (p. 291) that initial resort to the Commission must be had where it is necessary to determine upon evidence the peculiar meaning of words

or the existence of incidents alleged to be attached by usage to a transaction, this preliminary resort to the Commission being necessary in order to produce the uniformity which it is the purpose of the Interstate Commerce Act to secure. Certainly, the determination of what constitutes a delivery of livestock at the Stock Yards would have to be reached upon "voluminous and conflicting evidence" with respect to "intricate facts of transportation." It has been so held by this Court in *Adams* v. *Mills,* 286 U. S. 397, where the issue was the obligation of consignees of livestock located at the Stock Yards to pay a 25¢ charge for unloading inbound shipments, which charge the railroads had refused to pay. This Court said at page 409:

> "Whether the unloading at the Yards was a part of transportation was not a pure question of law to be determined by merely reaching the tariffs. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relationship to the line haul carriers, the history of the unloading charge of these Yards and the action of the parties is relation thereto."

In *U. S.* v. *American Sheet etc. Co.,* 301 U. S. 402, the industry attacked an order of the Commission requiring the railroads to discontinue free spotting service. The contention of the industry as stated by this Court (p. 404) was that the spotting service was transportation within the Interstate Commerce Act. This Court held (p. 407) that the findings of the Commission constituted an adjudication that the spotting service involved was not transportation service, and further held (p. 408):

> "The Commission is clearly in power to determine what is embraced within the service of transportation and what lies outside that service."

The same conclusion was reached in *Louisville Cement Co.* v. *U. S. et al.,* 19 Fed. Supp. 910, which case involved

the propriety of an order of the Commission condemning the same spotting service. The Court said (p. 916):

> "It is frequently difficult to determine when delivery is completed or transportation begun. It is a question of fact and the Interstate Commerce Commission is peculiarly fitted to determine at what point the carrier has begun or completed straight transportation."

In *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U. S. 247, the question was where transportation began. This Court held that resort to the Commission was necessary, saying (p. 263):

> "But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carriers, and the bounds within which it uniformly receives and delivers freight."

Thus, the questions of the reasonableness of Respondent's practices and what is included in transportation by railroad, which are the exact issues presented in this case, have been definitely held to be within the Commission's primary jurisdiction, and one decision so holding was based upon the facts obtaining at the Stock Yards here involved. The rule with respect to the Commission's exclusive primary jurisdiction has been applied to many phases of carrier activity, such as the reasonableness of rates, car distribution, allowances to shippers, classification of commodities, routing, etc. *T. & P. R. Co.* v. *Abilene etc. Co.*, 204 U. S. 426; *B. & O. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U. S. 246, 256; *Morrisdale Coal Co.* v. *Penna. R. Co.*, 230 U. S. 304, 313; *T. & P. R. Co.* v. *American Tie Co.*, 234 U. S. 138, 146; *Penna. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 469;

Loomis v. *Lehigh Valley R. Co.*, 240 U. S. 43, 50; *Northern Pacific R. Co.* v. *Solum*, 247 U. S. 477, 482; *Director General* v. *Viscose Co.*, 254 U. S. 498, 500; *Keogh* v. *C. & N. W. R. Co.*, 260 U. S. 156, 163; *W. & A. R. Co.* v. *Commission*, 267 U. S 493, 497; *Midland Valley R. Co.* v. *Barkley* 276 U. S. 482, 484; *Board* v. *Great Northern R. Co.*, 281 U. S. 412, 420-424; *Standard Oil Co.* v. *U. S.*, 283 U. S 235, 238, 240; *St. L., B. & M. R. Co.* v. *Brownsville District*, 304 U. S. 295; *General etc. Corp.* v. *Eldorado etc Co.*, 308 U. S. 422.

There are no cases holding contrary to those to which we have cited. Petitioner's brief (pp. 14, 15) refers to the *Puritan Coal Mining Co.* case, 237 U. S. 121, the *Littlefield* case, 237 U. S. 140, and the *Mulberry Hill Coal Co* case, 238 U. S. 275, but these cases are not applicable. All of them were referred to and distinguished by this Court in the *Barkley* case, 276 U. S. 482, 486, 487. *Covington Stock Yards* v. *Keith*, 139 U. S. 128, heavily relied upon by Petitioner, is not in point. That case lays down general rules of law with respect to transportation and delivery of property by railroads, but the cause of action arose prior to the effective date of the Interstate Commerce Act. If the case arose under the law now applicable, there can be no doubt that the decision would be in conformity with those we have cited.

The precise issues presented for determination in this case have been submitted to the Commission many times and have been decided by it under varying facts and in connection with deliveries at various public stockyards. Examples of the exercise of the Commission's jurisdiction are the decisions in *Southwestern etc. Co.* v. *Carriers*, 129 I. C. C. 730, 737, 738; *Allied Packers* v. *Carriers*, 14 I. C. C. 377, 382, 161 I. C. C. 641, 645; *Strauss etc. Inc.* v *Carriers*, 153 I. C. C. 609, 188 I. C. C. 487; *E. Kahns Sons Co.* v. *Carriers*, 192 I. C. C. 705, 709, 710, 73 Fed. (2) 948

950, and *Adolf Gobel* v. *Carriers,* 200 I. C. C. 606, 608. In *Hygrade etc. Corp.* v. *Carriers,* 195 I. C. C. 553, the Commission also exercised its primary jurisdiction to determine these issues at the Stock Yards in Chicago, its order being reviewed and reversed by this Court in *A. T. & S. F. R. Co.* v. *U. S.,* 295 U. S. 193.

The Commission's last pronouncement on the situation at the Chicago Stock Yards was made as recently as April 8, 1940, in *Swift & Co. et al.* v. *Alton R. R. Co. et al.,* 238 I. C. C. 179. In that case the Commission held that the transportation of livestock to the Stock Yards ended when the livestock had been unloaded into the unloading pens, and that it had no jurisdiction over the yardage charges of the Stockyard Company. A contrary decision herein would create the very lack of uniformity condemned by this Court. An interesting feature of that case was that Petitioner intervened in support of the complaint therein, stating in its intervening petition that it had instituted the case at bar and that the case involved substantially the same issues as the proceeding before the Commission and prayed for similar relief.

The Illinois rule is the same as that applied by this Court. The Illinois Public Utilities Act (Ill. Rev. Stat. 1937, Ch. 111-2/3) does not prescribe what is included in the transportation and delivery of livestock. The decisions of this Court have been held to be persuasive in determining questions arising under the Illinois law, *Terminal R. R. Assn.* v. *Commission,* 304 Ill. 312, and the rule has been applied in Illinois upon the authority of this Court's decisions. *Medusa, etc. Co.* v. *I. C. R. Co.,* 281 Ill. App. 549.

(c) Petitioner's brief argues that its complaint alleges no violation of the Interstate Commerce Act, and that this circumstance defeats any claim of primary jurisdiction in the Commission. We do not concede the correctness of the claim, but even if the complaint did not contain such an allegation, it would not deprive the Commis-

sion of jurisdiction. In the *Abilene Cotton Oil Co.* case, 204 U. S. 426, the action was for damages for a violation of an alleged common law right (p. 432). In the *Loomis* case, 240 U. S. 43, the action was for damages resulting from the claimed failure of the railroad to perform its common law duty to furnish cars (p. 47). This was also true in the *Barkley* case, 276 U. S. 482, 483, 484. It is certain that the jurisdiction of the Commission cannot be defeated by any form of words.

(d) While Petitioner argues that its complaint contains no allegations of a violation of the Interstate Commerce Act, yet that is the effect of the allegations made. While admitting that all charges paid by it were warranted by tariffs on file with the State or Federal Commissions or with the Secretary of Agriculture, Petitioner still wants Respondents to refund to it all yardage charges which it has paid to the Stockyard Company (R. 21), and to pay the yardage charges of the Stockyard Company on future shipments.

It is claimed that by making deliveries which required Petitioner to pay these charges, Respondents subjected Petitioner to the enforced payment of charges not justified by any tariff of Respondents on file with any Commission (R. 8, 13, 14, 17, 18). This amounts to a claim that Petitioner has been required to pay charges in violation of Section 6(7) of the Interstate Commerce Act.

Nor is this a claim which can be decided by a court from a mere reading of tariffs, as in the *Merchants Elevator Co.* case, 259 U. S. 240. If any court granted Petitioner a recovery, it would be first required to determine the propriety of the yardage charges of the Stockyard Company, since the payment of those yardage charges by Respondents would in effect be an allowance to Petitioner. It would then be required to pass on the propriety of Respondents' charges for the transportation of Petitioner's

livestock to determine if they should be reduced by the amount of the allowance.

So long as they are in effect, the tariffs of Respondents and of the Stockyard Company have the force and effect of statutes, both as to interstate and intrastate traffic. *Penna. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Atchison & S. F. R. Co.* v. *Commission*, 335 Ill. 70, 85, 86. But the granting of Petitioner's complaint would necessarily require a reduction in Respondent's tariff charges, since the yardage charges of the Stockyard Company must be paid by someone. It is elementary that a court will not undertake such an inquiry with respect to the rates and charges of Respondents and the Stockyard Company.

An effort at recovery somewhat similar to that now being made by Petitioner was made in *Aron* v. *Penna. R. Co.*, 10 Fed. Supp. 756. In that case the plaintiff sought to recover from the railroad amounts which the railroad had paid to certain stock yards for servicing livestock, and which the railroad had then collected from the plaintiff. The claim was that by collecting these charges from the plaintiff after having paid them to the stock yards company, the railroad had collected a charge not included in its tariffs. The Commission had previously held that the service performed by the stock yards company was a part of transportation, and had approved the charge made therefor.

Under these circumstances the court denied the claim (pp. 760, 761) upon the ground that a recovery would require the court to decide "upon a subject which lies within the special jurisdiction of the Commission." This decision was affirmed at 80 Fed. (2) 100, where the Court of Appeals held (p. 101) that the question of whether the services involved were a part of transportation was a question of fact, and (p. 103) that since there had been no finding by the Commission with respect to the plain-

tiff's claimed damage, there could be no recovery in a court of law.

(e) Petitioner endeavors to avoid the application of the cases we have cited by arguing at length that the delivery of its livestock to the unloading facilities of the Stockyard Company was a voluntary act on the part of Respondents; that they could have made other deliveries of the livestock at points within the station known as Union Stock Yards, Illinois, and thus avoided the imposition of yardage charges of the Stockyards Company, and that since they voluntarily elected to make a delivery resulting in the assessment of the charge, Petitioner should not suffer as a result thereof.

Thus, the Petition states that the Stock Yards did not constitute the station, Union Stock Yards, Illinois, to which the livestock was consigned (p. 3); that Petitioner left the selection of the delivery point within the station limits to Respondents (pp. 5, 17), and that the Court of Appeals has held that this election of Respondents deprived the courts of jurisdiction in the case (p. 18). This claim is reiterated at numerous places in the brief, and is elaborated at pages 21 to 32, both inclusive. Upon the basis of this argument, the Petition assigns as a ground for granting the writ a claimed inconsistency between decisions of this Court (pp. 5, 10-15).

In making this argument, Petitioner has misconceived or overlooked the allegations of its complaint. Paragraph 4 of that complaint (R. 6) alleges the publication of rates by Respondents to their station known as Union Stock Yards, Illinois. Paragraph 9 (R. 8, 9) alleges the shipment of the livestock here involved to the station Union Stock Yards, Illinois. Paragraph 3 (R. 5, 6) alleges that as to all livestock shipped to Union Stock Yards, Illinois, Respondents use a common depot or station for unloading and delivering livestock, which station is said to include

the platforms, chutes, pens and other facilities necessary in the delivery of such livestock. Paragraph 4 (R. 6) alleges that the unloading facilities described in paragraph 3 are owned and operated by, and are located on the property of, the Stockyard Company, and that they are the facilities which "have been designated and used by each of the Defendants as their station or depot known as Union Stock Yards in the City of Chicago, Illinois, for the delivery of livestock."

Supplementing these charges are allegations that Respondents have no facilities at Union Stock Yards, Illinois, for the unloading and delivery of livestock other than those of the Stockyard Company (par. 7, R. 7); that Respondents knew they could not complete the transportation of Petitioner's livestock to Union Stock Yards, Illinois, except by using the facilities of the Stockyard Company (par. 19, R. 13), and that Petitioner's only desire is to be permitted to use the facilities of the Stockyard Company at Union Stock Yards, Illinois, without expense (par. 24, 25, R. 16). All this reduces to allegations that all shipments here involved were consigned to a station known as Union Stock Yards, Illinois; that that station consisted of nothing but the unloading platforms and other facilities owned and operated by the Stockyard Company and through the use of which livestock was unloaded and delivered; and that there were no other facilities within the limits of that station which could be used in unloading and delivering the shipments.

The complaint contains no suggestion that Respondents could have delivered Petitioner's livestock at Union Stock Yards, Illinois, in any other manner than by using the facilities of the Stockyard Company. It results that by billing its livestock to Union Stock Yards, Illinois, Petitioner compelled a use of facilities of the Stockyard Company and a payment of its charges. And Petitioner was

fully aware of the fact, as the practice had been in effect for many years (R. 6, 8, 10, 11). The claimed inconsistency between the decisions of this Court is fanciful. See *U. S. Y. & T. Co.* v. *U. S.*, 308 U. S. 213, 219.

Conclusion.

The Petition and brief in support thereof contain various criticisms of the decision of the Court of Appeals, to which we have made no answer, since we submit that no importance should be attached to these criticisms, even if they were well-founded. Under the law, the decisions of the District Court and the Court of Appeals were correct for the reasons which we have assigned, and since a correct conclusion has been reached, the methods by which those courts may have reached that conclusion are of no consequence. *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 121; *Camp* v. *Gress*, 250 U. S. 308, 317; *Y. & M. V. R. Co.* v. *Mullins*, 249 U. S. 531, 532.

For the reasons assigned in the opinion of the Court of Appeals (R. 85), this is not a case which should remain pending in court under the holding of this Court in *General American Tank Car Corp.* v. *Eldorado Terminal Co.*, 308 U. S. 422. We submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

THE OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint, was filed May 31, 1939. It is reported in 27 Fed. Supp. 625, and appears at pages 46-55 of the record.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit affirming the dismissal of the complaint was filed April 4, 1940; the opinion of the court on rehearing was filed May 21, 1940. Both opinions are reported in 111 F. (2d) 913, and at pages 77-86, and 91-92 of the record.

FOREWORD.

In its brief in this Court Armour and Company is not arguing the case presented by its complaint, but a different case. The complaint was intended to raise, and did raise, this single question: Does the transportation service on livestock which the packers consign to themselves for delivery at the Union Stock Yards, in Chicago, end with the unloading of the stock into pens at that stockyards, or does it extend beyond the unloading and embrace also certain services and facilities incident to the removal of the animals from the stockyards for which services and facilities the Stock Yards Company assesses a so-called yardage charge? As we shall point out, Armour so interpreted its complaint at the time it was filed.

Thereafter, the Interstate Commerce Commission decided the very administrative question raised by Armour's complaint, in a contemporaneous proceeding to which Armour had made itself a party by intervention in order to take advantage of a favorable decision of the issue. The ruling of the Commission was adverse to Armour's claims, however, and, to avoid it, Armour is seeking "to alter or modify the true character of the complaint" as the Court below has found. (R. 92.) Armour's method of accomplishing this change is simply to assume a different state of facts from that alleged in the complaint and admitted by the motion to dismiss.

We shall endeavor to show the Court, first, that the courts below were right in holding that the complaint presents questions requiring preliminary action by the Commission, and second, that the different case which Armour seeks now to present would also raise questions requiring preliminary resort to the Commission.

STATEMENT OF THE CASE.

By its complaint in this case Armour and Company[1] attacks the long established practice respecting "the delivery of livestock consigned to it at Union Stock Yards, Illinois."[2] (Paragraph 2 of prayer; R. 21.) In the prayer for relief, Armour asks:

> "3. That a mandatory injunction be entered requiring the Defendants, and each of them, under penalty of law, on and after a date to be fixed by this court, to provide suitable ingress for Plaintiff to the point at which delivery of such livestock is tendered, and proper and reasonable egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to Plaintiff, *at the Union Stock Yards in Chicago, Illinois,* without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company, or any other person, firm, or corporation, save and except the said rates for transportation of said livestock, lawfully applicable thereto." (R. 21.)[3]

---

[1] Petitioner is sometimes referred to herein as "Armour"; Swift and Company as "Swift"; The Union Stock Yard and Transit Company of Chicago as "the Stock Yards Company" or "the Yards Company"; the respondents as "the trunk-line railroads" or "the carriers"; the Interstate Commerce Commission as "the Commission"; the traffic here involved as "direct shipments," namely, livestock which Armour consigns to itself for delivery "at the Union Stock Yards, Chicago, Illinois." (R. 32.)

[2] The definitions of terms used in Armour's brief (p. 2) are misleading. They assume the validity of Armour's claim that a different interpretation should be placed upon its complaint from that made by the two lower courts, and by Armour itself before the Commission. (See p. 30, this brief.) The definitions in Armour's brief of "Union Stock Yards, Illinois" and other terms should be contrasted with the definitions in the complaint itself. (R. 5-7.)

[3] Unless otherwise noted, emphasis in quotations in this brief has been added.

The "Defendants" are the line-haul carriers of the live stock. (R. 5.) The "Stock Yards Company," which is the owner and operator of the public stockyards known as the Union Stock Yards (R. 7) was not joined in this action. The "unloading pens of the Defendants" referred to above "for many years have been, and now are owned and operated by, and located on the property of, the said Stock Yards Company." (Par. 4, R. 6.) The "said station" is defined by the complaint as the facilities of the Stock Yards Company which, it is alleged, for many years "have been designated and used by each of the Defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois, for the delivery of livestock consigned to commission merchants, packers, and others buying, selling, or receiving livestock at, to or from Union Stock Yards * * *." (Par. 4, R. 6.) The only charges which are paid by Armour and the other packers, aside from the transportation rates, are the tariff yardage charges of the Stock Yards Company published and filed by it with the Secretary of Agriculture covering the facilities and services furnished by it beyond the unloading pens. (Complaint, Ex. B, R. 32-33; Ex. D, R. 35; Par. 6, R. 7.)

In addition to the mandatory injunction, Armour seeks to recover a sum equal to the amount of the tariff yardage charges which it has paid to the Stock Yards Company during the five-year period preceding the filing of this complaint. (Prayer, pars. 4, 5, R. 21.)

Motions to dismiss were filed on the grounds that preliminary action by the Commission was necessary, that the Stock Yards Company was an indispensable party, and that the District Court lacked jurisdiction of certain defendants.

The District Court sustained the motions to dismiss the complaint on all three grounds. The Circuit Court of Appeals affirmed on the ground that the case presented a que

tion for the primary determination of the Commission and held that it was unnecessary to pass upon the other two grounds.

Following that decision, and in connection with a petition for rehearing, Armour incorporated in the record in this proceeding a decision just rendered by the Commission in a case in which both Armour and the defendant railroads were parties, namely, *Swift and Company, et al.* v. *The Alton Railroad Company, et al.*, decided April 8, 1940, reported in 238 I. C. C. 179. (R. 100, *et seq.*)

The *Swift* case and the case at bar ran concurrently. While the lower courts were engaged in this cause in determining whether the complaint presented a question requiring the prior determination of the Commission, that body proceeded to investigate and to rule upon the administrative question brought before it by the Swift complaint. After five hearings, and on an extensive record, the Commission rendered its decision a few days after the decision below.

At the first hearing before the Commission in the *Swift* case, Armour entered its appearance and was granted leave to become a party to the proceeding by petition for intervention then duly filed. In submitting its petition Armour advised the Commission as follows:

> "Mr. Blanchard: * * * we have already invoked the jurisdiction of the courts on the same facts, and same subject matter by filing our suit as set forth in the petition. * * *
>
> * * * * * * *
>
> "Mr. Blanchard: Let the record show that counsel for Armour & Company offers to explain to the Commission that its failure to ask for relief from the Commission was not due to any lack of confidence in the Commission, or lack of confidence in its justness in handling matters of this sort, but merely was because the complainant felt this case would have to go to court anyhow, because the carriers would not obey any order of the Commission until they had tested it in court." (Appendix, this brief, p. xv.)

In its decision the Commission found:

> "Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief." (R. 101.)

In the face of this record Armour now takes the grave responsibility of asserting in this Court that the case does not involve the same facts and same subject matter as the *Swift* case, but, on the contrary, presents an entirely different controversy.[1]

In an effort to place itself in a position to take advantage of a favorable decision by the Commission, Armour intervened in support of the Swift complaint and advised that body that its case involved the same facts and subject matter. But to avoid the effect of the unfavorable decision by the Commission which has now eventuated, and thus to secure, if possible, different treatment from that accorded its competitor, Armour now contends here that the issues raised by the two cases are entirely different. Its brief here is devoted to an effort to distinguish the two cases, and to show that both courts below completely misunderstood and misconstrued its complaint. In its present brief Armour concedes, at page 12, that all its specifications of error in the petition for writ of certiorari are predicated upon *one alleged difference* in facts now asserted to exist between the complaint in the *Swift* case and the complaint here, namely, that Swift elected to take delivery "through the facilities of the Yard Company"

---

[1] Armour's statement of the facts of this case assumes, without so stating, that Armour's present interpretation of the complaint is correct, and disregards the fact that such interpretation is contrary to the one which it had previously asserted to be proper and which the two courts below also held to be the only proper interpretation. The facts as stated in the complaint stand admitted for the purpose of this motion to dismiss, but Armour errs in saying that the very different statement of facts in its brief stand admitted. (Brief, p. 8.)

hereas Armour, it is argued, elected to take delivery at me point other than the stockyards, unless the tariff yard-e charge of the Stock Yards Company against Armour paid by the railroads.

The length to which Armour finds it necessary to go in der to support its present position is illustrated by the atement here of its reasons for intervening in the *Swift* se. It tells the Court:

> "It was conceivable that in the future, Armour might have an occasional shipment which it too would 'elect to take delivery there'; *i. e.*, at the public yards * * *. In substance, Armour may be assumed to have been interested in the question raised by the Swift complaint, of the reasonableness of the practices of the carriers, on any occasional shipments Armour might thereafter order into the public stockyards, to be served by the Stock Yards Company, after transportation had been completed by delivery to the person to whom Armour directed delivery." (Brief, pp. 32, 33.)

We ask that this clear and deliberate representation to is Court be considered in the light of the allegations of e complaint and the record which Armour made in its tition for intervention in the Swift case (Appendix this ief, p. xvi), and its statement to the Commission of reasons for intervening in that proceeding. (Appendix is brief, p. xv.)

In support of a petition for rehearing in the Circuit urt of Appeals, and in the belief that it might be possible make some use of the Commission's discussion of prin-les in the *Swift* case, Armour made the report of the mmission in that case a part of the record in this pro-eding (R. 87, 88) and in respect thereto stated:

> "On April 11th, 1940 (one week after this Court's decision), the Interstate Commerce Commission issued its decision involving the *same railroads* and the *same yards,* passed upon the very administrative questions pointed out by this Court. As we shall show later, it defined the rights of any shipper who elects to make

use of the private property of the Stock Yards Company as a delivering facility for his shipments. As to shipments delivered at other than public stock yards, the Commission followed the reasoning of this Court and finds that transportation includes free delivery, and free egress from the point of unloading.

"Armour was a party to the case wherein the Commission rendered this opinion. But even if it had not been, the Commission's findings upon, and decision of the administrative question involved here, would inure to its benefit, and would be binding upon the Court in a hearing of this case on the merits." * * * (p. 6)[1]

In denying Armour's petition that the case be remanded for trial, the Court below pointed out that the ruling of the Commission was adverse to Armour's claim, and that any proceeding to set the Commission's order aside must follow the statutory procedure. (R. 91-92.)

THIS CASE AND THE SWIFT CASE HAVE A COMMON ORIGIN AND INVOLVE THE SAME SUBJECT MATTER AND THE SAME ISSUES.

The common history and origin of the two cases, the identity of the joint demands of the two packers which the respective proceedings were brought to enforce, and the terms of the complaint establish the identical character of the cases and the absence of any basis for Armour's contention that the facts of its complaint have been misinterpreted.

Approximately fifty years ago, Armour, Swift, and the other Chicago packers formed a purpose to acquire a proprietary interest in the Stock Yards Company and to participate in the earnings accruing to that Company from yardage charges on livestock which then, as now, the packers were consigning to themselves for delivery at the stockyards owned and operated by that Company. Their position was that the services and facilities furnished by the Stock

[1] Brief in Support of "Petition of Plaintiff-Appellant for Rehearing and Motion for Order Remanding the Cause to the Lower Court for Trial, and for a Supplemental Opinion;" filed April 19, 1940. (R. 87.)

Yards Company in respect to their direct shipments, after the unloading thereof; were not a part of the transportation service furnished by the railroads, but a stockyards service, as to which they were free to deal solely with the Stock Yards Company and that their patronage of these services and facilities was a thing of value which they proposed either to sell to, or to withhold from that Company. To accomplish their objective, Armour, Swift and other packers threatened to withdraw their business from the Stock Yards Company, and, to make the threat real, constructed their own yard for the receipt of livestock adjacent to that of the Yards Company. Acting in concert, Armour and Swift then brought suit in the State Court of Illinois to compel the Stock Yards Company (which owned the tracks over which the trunk lines must service the new yard) to permit the trunk lines to deliver livestock at their own yard. In that proceeding in court the packers proved that the trunk-line railroads stood ready to serve the packers' newly constructed receiving yard, and to deliver there all the packers' direct shipments. Upon the basis of this status, thus created, Armour, Swift and the other packers, still acting in concert, effected a deal with the Stock Yards Company, the result of which was that in return for a proprietary interest in the Union Stock Yards, and a share in its profits, the packers deeded over to the Stock Yards Company their own receiving yard, and accepted, established and denominated as their own receiving yard forever, the yards of the Stock Yards Company. The Commission makes detailed findings as to these transactions which it then summarizes as follows:

> "The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and

intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Company and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), *the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.*" (R. 110-111.)

At the packers' own yard, which, fifty years ago, the trunk-line railroads stood ready to serve, and actually attempted to serve, the packers would have had to unload the livestock at their own expense[1] but they would have been free from the imposition of the yardage charge of which they now complain. The Commission has found that solely to obtain a proprietary interest in the Union Stock Yard and Transit Company, Armour, Swift and the others gave up their own receiving yard and, by agreement, made the premises of the Stock Yards Company, in perpetuity, their own receiving yard.

One reference in the Interstate Commerce Commission's report to Armour's participation in these transactions is as follows:

"The report definitely shows, however, that J. O.

[1] It is only at public stockyards that by custom and by requirement of the Interstate Commerce Act, Sec. 15(5) the unloading is performed by the carriers without extra charge. Armour admits this at page 22 of its brief.

Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.'"[1] (R. 110.)

For the services and facilities furnished by the Yards Company in respect to their direct shipments, the packers have always paid the Yards Company a yardage charge in addition to the freight rates. Their patronage in respect to these services they sold to that Company, yet they now ask that the railroads, which had no part in any of these transactions, be required to absorb these yardage charges out of the freight rates. The Commission, which itself determined the measure of, and prescribed the livestock rates on which the livestock is transported, has found that no allowance was made in the rates to cover these stockyards services. The finding of the Commission is as follows:

> "The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. *They have never been compensated for any services performed at the stockyards after the placement of the*

[1] In the Report of the Federal Trade Commission to which the Interstate Commerce Commission here refers, the transactions between the Chicago packers and the Stock Yards Company are the subject of a separate chapter, which is introduced by the following statement:

> "The history of the Chicago yards and of the deals by which the packers secured their bonuses and by which Armour & Co. acquired a stock interest in the Maine company [the top holding company owning the Stock Yards Company] is so remarkable that a separate chapter is given to this subject." Report of the Federal Trade Commission on the Meat-Packing Industry, Part III (1919), p. 51.

animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services." (R. 111.)[1]

THIS CASE AND THE SWIFT CASE ARE BASED UPON IDENTICAL DEMANDS BY THE PACKERS IN THE YEAR 1933.

In May, 1933, as the basis for the proceedings later begun by each, Armour and Swift, acting in concert, made identical demands upon the trunk-line railroads in the form of a series of letters. A comparison of the letters, which are exhibits to the complaint here (R. 32-37), with the letters written by Swift and fully discussed by the Commission (R. 105, 106) shows those letters to be identical except for necessary formal differences. (See also Appendix, this brief, pp. vii-ix and xvii.) In those letters Armour and Swift stated that the Stock Yards Company,

[1] The question involved in these cases first came before this Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935) known as the *Hygrade* case. The full factual situation was not before the Commission or the courts in that case.

The facts developed for the first time in the Commission's investigation in the *Swift* case were brought to light by an investigation of the Federal Trade Commission. That investigation covered the relationship of the large packers to the Union Stock Yard and Transit Company and to the yards at all the principal livestock markets. It brought to the attention of Congress also the relations of Armour, Swift and the other packers with the Stock Yards Company regarding the yardage charge of that company on direct shipments of livestock and showed that the parties had always treated the service covered by that charge as a stockyards service and not a transportation service. It was this investigation which led to the enactment of the Packers and Stockyards Act, 1921 (7 U. S. C. Ch. 9) which subjects the stockyards and all their yardage charges to regulation by the Secretary of Agriculture. That legislation and amendments to the Interstate Commerce Act were pending before Congress at the same time. Paragraph (5) of Section 15 of the Interstate Commerce Act

which had been receiving the livestock as their agent (complaint, par. 15; R. 10-11) would not act as their agent thereafter, and it was demanded that the railroads deliver the livestock to them at the stockyards free from the payment of the yardage charge of the Stock Yards Company.

By these demands the packers sought to obtain preferential treatment as against the livestock producers. The direct shipments of the packers are not purchased through the competitive processes of the public market conducted at the Union Stock Yards, but at points in the country and on the farms. (R. 5, 104.) From the beginning the Stock Yards Company has collected a yardage charge on every animal unloaded on its premises, whether the shipments were direct shipments to a packer or ship-

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was one of the amendments to the Act enacted on March 28, 1920. Of that amendment this Court has said:

> "Paragraph (5) of § 15, was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received.* The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock." (*Atchison, T. & S. F. Ry.* v. *United States,* 295 U. S. 193, 199 (1935).)

Ever since the enactment of the Packers and Stockyards Act the Stock Yards Company has filed with the Secretary of Agriculture its yardage charges covering "the receiving of livestock, and applicable to the direct shipments of the packers" The Secretary has prescribed the rates therefor at a number of yards, and this Court has sustained charges thus prescribed. *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470 (1938), and other cases cited in the Commission's decision in the *Swift* case, R. 119.

ments to a commission merchant for sale. (R. 104.) It was the producers who secured the enactment of Section 15(5) and the producers have never complained against the yardage charge. In its decision in the *Swift* case, the Commission, referring to the producers' attack upon the unloading charges in the controversy later settled in *Adams* v. *Mills*, 286 U. S. 397 (1932), said:

> "The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted." (R. 116.)
>
> * * * * *
>
> "No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge." (R. 117.)

The packers' contention that on their own direct shipments transportation does not end with the unloading and that they should be furnished the services and facilities of the Stock Yards Company on such shipments free of the obligation to pay the yardage charge is advanced for the purpose of obtaining preferred treatment for their direct shipments at the expense of the producers whose stock is shipped to the stockyards for sale on the public market. (Cf. p. 39, below.)

SUMMARY OF ARGUMENT.

Armour has three choices in respect to the delivery of its livestock in Chicago, namely, delivery on the public team tracks of the individual defendants, or at the Union Stock Yards, or on its own industry tracks. Of these, it has always elected to consign its shipments to the Union Stock Yards. By its complaint here it attacks the practice under which it is required to pay the tariff yardage charge of The Union Stock Yard and Transit Company on all shipments received at the Union Stock Yards.

To avoid a determination which has just been made by the Interstate Commerce Commission of the very administrative question raised by Armour's complaint, in a proceeding in which Armour is a party, petitioner is seeking to "alter or modify" the true nature of its complaint, as the Circuit Court of Appeals has held. The different case which Armour now seeks to present, however, would likewise raise questions requiring preliminary resort to the Commission.

The clear terms of the complaint impeach Armour's present theory that it did not order its shipments delivered at the public stockyards known as Union Stock Yards. That theory, designed to avoid the decision of the Commission in the *Swift* case, ignores the fact that the demands upon the railroads which Armour and Swift are currently seeking to enforce, were literally identical and were made in concert. The Armour complaint not only alleges affirmatively that delivery at the Union Stock Yards was made at the direction of Armour, but expressly alleges also that the transportation rates in the contracts of transportation applied only to delivery at the stockyards, that the contracts could not be complied with except by delivery at that

point, and that at the destination "Union Stock Yards" there were no facilities for unloading and delivering livestock except those owned and operated by the Stock Yards Company.

The fact that Armour and Swift announced in 1933 that they would no longer pay the customary yardage charges of the Stock Yards Company filed in that Company's tariffs with the Secretary of Agriculture did not qualify their joint demand that their livestock be delivered at the Union Stock Yards. The Commission having now held the assailed practice at Union Stock Yards to be reasonable and lawful, the purpose of Armour's present theory respecting its complaint is to avoid the jurisdiction of the Commission and thus to force the carriers to discriminate in favor of Armour not only as against the producers who ship livestock to the Union Stock Yards but also as against Swift and the other packers.

The issues presented by the complaint, with respect both to the requested injunction which would change the established practice for the future, and to the determination of the validity of Armour's claim and allowance of damages, if any, for the past, are of a nature requiring preliminary resort to the Commission. Among the issues raised is the determination of the exact point at which the transportation of these shipments ends at the Union Stock Yards, which in this case cannot be determined as a matter of law by merely reading the tariffs. The complaint requires the decision of exactly what services would fulfill the carriers' duty to provide reasonable delivery services and whether the established practice is unreasonable. The complaint also demands the payment of allowances by the carriers to Armour, which can be authorized only by the Commission. Rate making is essentially involved in the terms of the complaint, particularly in the determination of damages, if any, which could be measured only by the making of a reasonable rate. Preliminary determination of these

questions by the Commission is necessary because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, only in that way can there be obtained the benefits of the Commission's expert knowledge of the intricate and complex factual situation.

These issues are not avoided by Armour's present theory of the complaint. Instead, the theory creates additional issues of the same character which are likewise within the Commission's exclusive primary jurisdiction, such as whether the carriers should be required to construct extensive delivery facilities at the Union Stock Yards, but separate from the public stockyards, and what amount would have been a reasonable rate to such facilities had they been constructed in the past.

The Commission's jurisdiction here is based upon the alleged violations of the Interstate Commerce Act which are asserted, implicitly and explicitly, in the complaint. Plaintiff's theory that the need for preliminary resort to the Commission on the substance of the issues may be avoided by the form of the complaint has frequently been rejected by this Court. This is not a suit for loss or damage and the cases plaintiff relies upon have no application here.

The dismissal of the complaint is required not only because of the lack of preliminary resort to the Commission, but also because of plaintiff's failure to join the Stock Yards Company, an indispensable party. That Company owns and operates the only facilities for livestock delivery at Union Stock Yards and assesses and retains the tariff yardage charges attacked here. Finally, the complaint against those defendants who are trustees and receivers was properly dismissed because of plaintiff's failure to obtain consent to bring this suit.

ARGUMENT.

Introduction.

In support of its petition in the court below for rehearing, and for the remand of the case for trial, Armour, referring to the Commission's decision in the *Swift* case, said:

> "Armour was a party to the case wherein the Commission rendered this opinion. But even if it had not been, the Commission's findings upon, and decision of the administrative question involved here, would inure to its benefit, and would be binding upon the Court in a hearing of this case on the merits * * *." (Brief, April 19, 1940, p. 6.)

Nevertheless, Armour now contends that there is no administrative question involved here and that the controlling question raised by its complaint is entirely different from that presented in the *Swift* case. Apart from its relationship to the *Swift* case, we desire to show the Court that this cause presents an administrative question for determination by the Commission and not primarily by a court. Before doing so, however, we shall deal with Armour's effort to change the essential character of the case actually established by its complaint and to repudiate its assertion to the Commission at the time the complaint here was filed, that Armour, by this complaint, had "invoked the jurisdiction of the courts on the same facts, and same subject matter" as the *Swift* case.

These two complainants, Swift and Armour, engaged in the same business, and purporting to be in competition, each with the other, were constantly shipping livestock consigned to themselves at a stockyards which they had made their own, and which, "for a substantial consideration," (R. 111) they had agreed to use for the receipt of

their direct shipments, forever. All of these shipments moved, and could only move on uniform bills of lading (called livestock contracts) in the precise form prescribed by the Commission[1] and on freight rates likewise prescribed by the Commission,[2] which rates were applicable only on shipments to the facilities of the Stock Yards Company. (Complaint, par. 19, R. 13.) The rights of both shippers were and are subject to the provisions of the Interstate Commerce Act, the primary purpose of which, this Court has many times held, is to prevent every kind and form of discrimination. Both shippers have made identical demands upon respondents by means of identical letters, and have received thereto identical replies. This was the status of events in 1933 when Armour and Swift made the joint demands which they now seek to enforce.

Having with Swift this common status resulting from fifty years of joint action, the proposition which Armour seeks here to sustain is that it has so contrived its case in court that it is not bound by the administrative findings of the Commission in the *Swift* case to which it was a party, but on the contrary is entitled to an opportunity through a trial in the District Court to seek from the carriers different treatment from that to which the Commission has found Swift to be entitled. And, strangely enough, in aid of its effort to secure such different treatment Armour insisted that "the Commission's findings upon, and decision

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[1] In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193 (1935) (the *Hygrade* case), this Court said:

> "* * * the Interstate Commerce Commission, acting under authority of Section 15(1) and following a form of clause submitted by shippers and carriers, prescribed a uniform livestock contract * * *." (p. 198.)

[2] *Livestock—Western District Rates, Docket 17000*, 176 I. C. C. 1 (1931).

of *the administrative question involved here, would inure to its benefit, and would be binding upon the Court in a hearing of this case on the merits.*" (Armour's brief in Circuit Court of Appeals, April 19, 1940, p. 6.)

I.

THE DIFFERENCE WHICH ARMOUR ATTEMPTS TO CREATE BETWEEN THE QUESTION PRESENTED BY THE COMPLAINT HERE AND BY THE COMPLAINT IN THE SWIFT CASE DOES NOT EXIST.

We shall state first, and as accurately as Armour's statement of its position will permit, the specific difference between the two cases which Armour seeks to establish in an effort to obtain a different determination of the controversy from that made by the Commission in the *Swift* case.

Secondly, we shall discuss the joint demands of the packers, and their respective complaints, both of which are based on those demands, to show that Armour is now seeking to "alter or modify the true character of the complaint" (R. 92) and that the Circuit Court of Appeals was right in so holding.

A. The Asserted Difference Between the Two Cases.

The Commission has outlined the choice which Swift and Armour had and have in selecting a place of delivery in the Chicago district as follows:

> "Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not ex-

tensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there." (R. 111-112.)

Armour recognizes that the Commission's decision "defined the rights of any shipper who elects to make use of the private property of the Stock Yards Company as a delivering facility for his shipments,"[1] and points to the last sentence in the Commission's finding quoted above which shows that Swift elected to take delivery at the Union Stock Yards. Attempting then to distinguish its own situation from that of Swift, Armour states:

"But until evidence shall show that Armour here attempts to recover damages on some shipment which it did order into the public yards, that case (the *Swift* case) cannot concern nor affect the shipments here involved. Armour did not order these shipments into the public yards. They were taken there without its consent, by the willful and disobedient act of the railroad." (Armour's brief, December 2, 1940, p. 33.)

What Armour asserts to be a controlling difference in facts rests on the contention that while its demands upon the railroads, like Swift's, were for delivery at Union Stock Yards, Chicago, Illinois, its demands, unlike Swift's, were for delivery at some point other than the stockyards. As will be shown, however, the demands of both packers were

[1] Armour's brief in Support of Petition for Rehearing in Circuit Court of Appeals, dated April 19, 1940, p. 6.

made in concert, were identical both in substance and in form, and were for delivery at the stockyards. Moreover, the complaint specifically alleges that defendants did not have the required facilities for delivering livestock at Union Stock Yards, Chicago, Illinois, other than those of the Union Stock Yard and Transit Company (Par. 7, R. 7; Par. 19, R. 13); that the facilities of the Stock Yards Company constituted the usual place of delivery, as designated in the Live Stock contract (R. 6, 23) and that the "contract" rates did not apply to any facilities at Union Stock Yards, Illinois, except those of the Stock Yards Company. (R. 13.) The record shows, therefore, that the factual difference relied upon does not exist.

B. Identical Demands of Armour and Swift Constitute the Basis of Both Proceedings.

The complaint here, and that in the *Swift* proceeding, were brought to enforce identical demands which Armour and Swift made upon the railroads in 1933 by letters which are incorporated in Armour's complaint and which are described by the Commission in the *Swift* case. (R. 11, 12, 32-38; R. 105, 106.) The plain terms of those demands destroy the contention now made that Armour consigned its shipments to any point other than the public stockyards at Chicago owned and operated by The Union Stock Yard and Transit Company.

With three choices as to delivery offered to "the shippers of livestock, under the provisions of the applicable tariffs", as the Commission has found, the demands of Armour and Swift were not for delivery "on team tracks of the individual railroads at other points in the Chicago district"[1]

[1] The complaint here alleges, and the Commission found in the *Swift* case, that the team tracks of the defendants which are, and have always been, available to Armour, and are constantly used for livestock unloading by the smaller packers, are located at points in the

or "on industry tracks serving their [the packers'] plants, by paying the published switching charges in addition to the line-haul rate." (R. 111, 112.) Either of these optional deliveries, as the Commission has found, Armour and Swift could have had for the mere asking at any time, without the slightest question or controversy. The demands which produced this controversy were for delivery at the stockyards free from the payment of the tariff charge of the Stock Yards Company.

The letter of May 9, 1933, which describes the shipments covered by the consignments and the demands made in respect thereto, is, in part, as follows:

> "Numerous direct shipments of livestock are *consigned via your line of railroad to Armour and Company or its subsidiaries at the Union Stock Yards, Chicago, Illinois.* By direct shipments are meant shipments in which Armour and Company, or its subsidiaries, are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to the completion of the transportation contract."
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> * * * * *
>
> "Armour and Company is prepared to accept such shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards and, within a reasonable time, to remove the livestock therefrom to its own plants *without other use* of the facilities of the Union Stock Yard & Transit Company of Chicago." (Complaint, Ex. B; R. 32, 33.)

Armour thus declares that it had consigned its shipments for delivery at the Union Stock Yards and that it desired to use the facilities of the Stock Yards Company. It then

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Chicago district other than the Union Stock Yards. Paragraphs 7 and 19 of the complaint allege that there are no facilities for the delivery of livestock at Union Stock Yards other than those on the premises of the Stock Yards Company. (R. 7, 13.)

wrote the Stock Yards Company, enclosing copies of its letter of May 9th above, and advising:

> "Kindly accept this as official notice that on and after May 25th, 1933, we shall not pay yardage charges on direct shipments of livestock received or accepted by us in the manner outlined in said letter." (Complaint, Ex. C; R. 34, 35.)

The Stock Yards Company replied in part as follows:

> "So long as Armour and Company route or permit or cause to be routed their shipments of livestock to themselves at the yards of this Company, The Union Stock Yard and Transit Company of Chicago will insist on the payment of its yardage charges before such livestock is released.
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> • • • • •
>
> "Until and unless your threat of not paying the tariff yardage charges of The Union Stock Yard and Transit Company of Chicago is withdrawn, or until and unless such charges are paid, this Company will not permit livestock *consigned to you at its yards* to be delivered to you or to your employees, on and after May 25, 1933." (Complaint, Ex. D, R. 35, 36.)

Similarly, Armour's letter to the carriers dated May 16, 1933, contained the following:

> "As a matter of information, we furnished the Union Stock Yards & Transit Company of Chicago, Illinois, a copy of our letter to you, dated May 9th, 1933, concerning shipments of livestock consigned to us at Union Stock Yards Station, Chicago, Illinois."
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> • • • • •
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> "You are hereby notified that on and after May 25th, 1933, the Union Stock Yards & Transit Company of Chicago, Ill., has no authority, after unloading such livestock, as your agent, in accordance with its tariff, to thereafter accept, or receipt for such livestock for us, as our agent, for our account, or in our name."
>
> • • • • •
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> "On and after May 25, 1933, any delivery by your railroad of our livestock to the Union Stock Yard & Transit Company of Chicago, Illinois (*other than delivery of such livestock to the Union Stock Yard & Transit Company of Chicago, Illinois, as your agent*

for unloading and delivery to us) will constitute a conversion of our property." (Complaint, Ex. E, R. 36-37.)

In Armour's letter of the same day, to the Stock Yards Company, Armour again stated its purpose that the shipments be turned over by the defendants to the Stock Yards Company and unloaded by that Company at its stockyards. The letter reads, in part, as follows:

> "You are hereby advised that any and all livestock which on or after May 25th, 1933, may be delivered to you by said carriers as their agent for unloading[1] (as provided in your tariff No. 5, I. C. C. No. 8) and for delivery to us as consignee in accordance with the respective contracts of carriage covering the same, will be accepted and received by us from said carriers, (or from you as their agent) and promptly removed from your premises after such acceptance and receipt." (Complaint, Ex. F, R. 37.)

These identical demands are the basis both of Armour's complaint (by paragraphs 16, 17, 18 and 19 at R. 11, 12, 13) and of the *Swift* complaint (by paragraphs VIII, IX and X thereof in appendix to this brief, pp. vii-xi). Armour's petition of intervention in the *Swift* case "concurs in, and adopts the statements made in" those paragraphs and other paragraphs of the Swift complaint. The petition for intervention then continues as follows: "But in so far as said Paragraphs are limited in their application to the business and actions of complainant, Petitioner alleges that said statements are equally true, and equally applicable to and descriptive of the business and actions of Petitioner." (Appendix this brief, p. xvii.)

It is the terms of these identical demands which the Commission discusses at length in its report. (R. 105, 106.) It is these demands which constitute the basis for the Commission's finding that of the three choices available

[1] Unloading is furnished by the railroads only at public stockyards. (R. 111.)

to "the shippers of livestock" "under the provisions of the applicable tariffs," Swift elected to take delivery at the stockyards. (R. 111.) It will be seen, therefore, that the Commission has put the same interpretation upon these joint demands as have the courts below.

C. The Complaint Demands Delivery at the Stockyards.

We turn now to the terms of the complaint by which Armour seeks to enforce these demands jointly made by it and by Swift. Like the demands, the clear allegations of the complaint show that Armour was driven to its present theory after the complaint was filed, and after it had advised the Commission that it involved the same facts and subject matter as the *Swift* case. Every page of the complaint contradicts Armour's contention that it intended and attempted to obtain delivery at any point other than the stockyards, but it is necessary, we believe, to read only seven paragraphs of the complaint, numbers 3, 4, 7, 19, 24, 25 and 26, to recognize the soundness of the finding of the Court below that Armour is seeking "to alter or modify the true character of the complaint." (R. 92.)

The complaint alleges:

> "3. As to all livestock * * * shipped to Union Stock Yards, Illinois, * * * each of said defendants * * * has used for many years, and still uses, *a common depot or station at such point* for the receiving, loading, unloading and delivering of ordinary livestock * * * which includes loading and unloading platforms, chutes, chute pens, alleys, and storage pens, and other facilities *necessary to* the shipment, receipt for shipment, or *delivery of livestock* transported by rail * * *." (R. 5, 6.)
>
> "4. The unloading platforms, chutes, chute pens, alleys, and storage pens *referred to in the preceding paragraph as Defendants' common railroad depot or station*, for many years have been, and now *are owned and operated by and located on the property of, the said Stock Yards Company.*

"For many years, *the facilities of the Stock Yards Company, above described, have been designated and used by each of the Defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois,* for the delivery of livestock consigned to commission merchants, packers, and others buying, selling, or receiving livestock at, to or from Union Stock Yards * * *." (R. 6.)

"7. That at no time herein involved have the Defendants, or any one of them, owned or operated, or do any of them now own or operate any pens, chutes, or other facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock, or the receipt of livestock for shipment, at Union Stock Yards, Illinois, but acting in concert, by some lease, agreement, or other arrangement unknown to Plaintiff, have used and still use the platforms, pens, chutes, and other facilities of the Stock Yards Company for such unloading and delivery, and receipt and loading of livestock at said Union Stock Yards station. And each of said Defendants has heretofore published, and now publishes in current tariffs, the consideration paid by it, to said Stock Yards Company for loading or unloading such livestock into or out of cars at said station." (R. 7-8.)

"19. That during all times and dates herein mentioned, each Defendant well knew *that it owned or operated for its own account, no facilities into which shipments of livestock consigned to Plaintiff at said common station, Union Stock Yards, Illinois, could be unloaded,* and from which such shipments of livestock could be tendered or delivered to Plaintiff; and each Defendant well knew that it could not fully perform any of said written contracts for the transportation of such shipments to Union Stock Yards, Illinois, and for delivery thereof to the Plaintiff at such station, *for the consideration named in such contracts,* save by use of the pens, platforms, chutes, and other facilities of its said agent at said station; * * *." (R. 13.)

Here are four allegations of fact which clearly state the meaning of terms used throughout the complaint, as follows:

1. The defendants maintain a common depot or station for the receipt of livestock at "Union Stock Yards, Illinois." (Par. 3).

2. The said common depot is "owned and operated by and located on the property of the Stock Yards Company." (Par. 4).

3. The said facilities of the Stock Yards Company have been designated by the defendants *"as their station or depot known as Union Stock Yards."* (Par. 4).

4. Defendants have no "facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock at Union Stock Yards, Illinois," except the facilities of the Stock Yards Company, (Par. 7, 19), and the Bill of Lading rate applies only to the Stock Yards Company's facilities at such station. (Par. 19).

On the basis of these clear-cut averments, the allegations of paragraphs 24, 25 and 26 establish beyond dispute the exact nature of Armour's claim.

Paragraph 24 alleges that Armour has

> "* * * sought *only* to be permitted to take possession of its shipments of livestock at the unloading pens used by the Defendants as their depot or station in the Union Stock Yards, Chicago, Illinois, or at whatever point *therein* tender of said livestock was made, *and thence to remove* said shipments of livestock to a public street, or to such other point, off the premises of said Stock Yards Company, as that company, or the Defendants, might designate * * *." (R. 16)

Paragraph 25 alleges:

> "That the Plaintiff has not since May 25, 1933 * * * required the use of any facility of said Stock Yards Company, or any service from said Stock Yards Company, *save such* as was incidental to the unloading, storage pending tender of delivery, tender of delivery, and delivery to Plaintiff * * *." (R. 16)

In the light of the allegations, facts and definitions stated in paragraphs 3, 4, 7 and 19, paragraph 26 is so decisive of the sole issue discussed by Armour that it is quoted below in full:

> "26. Since May 25, 1933, Plaintiff has continuously insisted and demanded, and still demands of the Defendants, that they deliver its livestock to it at the

depot or station designated in their respective tariffs, viz., Union Stock Yards, Illinois, without the imposition of any lien or charge (save and except the respective tariff rates for transportation) against said livestock by any Defendant or its agent, the Stock Yards Company, in all cases where Plaintiff was willing and able to promptly remove such livestock from the unloading pens, or from the point where delivery was first tendered, within a reasonable time after the unloading of same from the cars, but each Defendant has continuously refused and still refuses to effect any such delivery of such livestock to Plaintiff at such station." (R. 16-17.)

Armour thus identifies the facilities of the Stock Yards Company as defendants' station or depot, known as Union Stock Yards, in the City of Chicago, Illinois (pars. 3, 4; R. 5, 6); alleges that they are the only facilities for delivery at that point (par. 7; R. 7); avers that it is only to those facilities that the Bill of Lading rates apply (par. 19, R. 13); declares that it is at the station so defined that Armour has always demanded, and still demands delivery, (par. 26; R. 16) and describes exactly what services and facilities it requires from the Stock Yards Company in respect to such delivery (pars. 24, 25, 26; R. 16) These allegations, which are the heart of the complaint, are not ambiguous. They compel the view expressed by the court below that in an effort to avoid the administrative question, and the effect of the Commission's determination of that question in the *Swift* case, Armour is seeking "to alter or modify the true character of the complaint." (R. 92.)

There are a few additional points respecting the complaint which we desire to bring to the attention of the Court.

D. Armour's Definitions of Terms in Its Brief Are Misleading.

Notwithstanding the terms of the 1933 demands and of the complaint itself; which show clearly that Armour was requiring the delivery of its shipments at the stockyards, it argues now that defendants should have made delivery on their team tracks or through some other facilities stated to be located at "Union Stock Yards, Illinois." As illustrative both of the form and the content of plaintiff's argument on this point, we respectfully direct the attention of the Court to the definition of certain terms appearing on page 2 of its brief, especially the terms "Union Stock Yards, Illinois," "team tracks," and "industry tracks." Here in the form of mere definitions of terms, Armour makes the first effort to give substance to its theory. It does so simply by an interpretation of the complaint which the lower courts rejected. The difference between the terms actually used in the complaint and the definition given to the same terms in the brief, measures the effort which Armour is making to change its case.

In describing "Union Stock Yards, Illinois" as "the entire railroad station 'area' to which the railroads are engaged in transporting 'property, including ordinary livestock'" (page 2) Armour makes reference to a quotation from *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 (1937), reading as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry."[1]

[1] Significantly, in that same decision the Court held that the determination of what is embraced within the service of transportation and what lies outside that service is a matter within the jurisdiction of the Interstate Commerce Commission. (See page 46 below.)

The same quotation is repeated, and again without comment, in connection with the same argument on page 23 of the brief. This statement of the Court had particular reference to Pittsburgh, but it applies generally to every city. The Commission has found, as we have shown, that Armour was not limited to a delivery at the Union Stock Yards, but had, as well, the choice of delivery on the public team tracks of the individual roads located in Chicago, but not at the Union Stock Yards, or delivery at Armour's own plant by paying the applicable switching rate. But plaintiff's purpose in referring to the Court's statement in the case cited is to leave the inference that what is true in respect to the delivery in the city as a whole is true at every point in the city, namely, that at "Union Stock Yards, Illinois," the defendants maintain team tracks and other facilities available for the delivery of livestock. Armour's definitions on brief of "team tracks" and "industry tracks" are intended to give the same understanding. Sufficient answer to this argument is Armour's own clear allegations in paragraphs 4, 7 and 19 of the complaint:

> "For many years, the facilities of the Stock Yards Company, above described, have been designated and used by each of the defendants as their station or depot, known as Union Stock Yards, in the City of Chicago, Illinois * * *" (Par. 4, R. 6.)

> "That at no time herein involved have the Defendants * * * owned or operated or do any of them now own or operate any pens, chutes, or other facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock * * * at Union Stock Yards, Illinois, but acting in concert * * * have used, and still use the platforms, pens, chutes, and other facilities of the Stock Yards Company." (Par. 7, R. 7.)

The allegations of paragraph 19, (R. 13) which are to the same effect, state, also, the fact that the rates named in the Bill of Lading did not apply to any point at the station Union Stock Yards save the facilities of the Stock Yards Company.

These allegations of the complaint, which was drawn and filed before the plaintiff conceived the theory upon which it now proceeds, are in conformity with the Commission's finding in the *Swift* case that the team tracks of the individual defendants which are and have always been available for the delivery of livestock, and are constantly being used for that purpose, are located not at Union Stock Yards, Illinois, but "at other points in the Chicago district." (R. 111.) A somewhat oblique recognition of the facts of the situation has found its way into Armour's brief in the following statement:

> "That contract was capable of complete performance by the railroad without any use of Yard Company's property whatever, *i. e.*, by electing team track delivery, private siding delivery, *or by the construction or leasing of carrier owned pens within the station limits, at a point removed from the public stock yards.*" (Brief, pp. 24-25.)

E. The Obligation Under the Uniform Bill of Lading in Respect to Place of Delivery.

The first paragraph of Armour's Statement of the Case in its brief is as follows:

> "Armour contracted, on usual bill of lading form (23-30) with the railroad, to transport a shipment of livestock from a certain origin to a station named in Defendants' tariffs as 'Union Stock Yards, Illinois', and there to deliver the shipment to Armour." (Brief, p. 6.)

It is stated further:

> "We have a contract between Armour and the railroad. (Rec. 9.) But that contract merely covers transportation to *any* delivery point in the wide area comprising the station 'Union Stock Yards, Illinois,' that the railroad might select. There was no selection by Armour of team track, private track, public stock yards or elsewhere, as the delivery point." (Brief, p. 23.)

As we have said, the true nature of this case as made by the complaint, and Armour's statement to the Commission respecting the case, are so clear that Armour would seem to be taking a grave responsibility in seeking here to create a different case. The Court may contrast the statement quoted above from Armour's brief that the contract of transportation "merely covers transportation to *any* delivery point in the wide area comprising the station 'Union Stock Yards, Illinois'," with the allegation of fact in paragraph 19 (R. 13) of the complaint that "the consideration named in such contracts," i.e., the transportation rate specified in the Bill of Lading applies only to a delivery through the facilities of the Stock Yards Company.[1]

Furthermore, the complaint alleges in the clearest terms that defendants' common depot or station at Union Stock Yards is and has been for many years the facilities of the Union Stock Yard and Transit Company. (Pars. 3, 4; R. 5, 6.) The "usual bill of lading form" (an exhibit to the complaint) to which Armour refers above, is the form prescribed by the Commission, and it does not provide, as Armour asserts, for "transportation to any delivery point in the wide area." It provides rather, that "the carrier agrees to carry to its usual place of delivery at destination." (R. 23.) Having alleged that the facilities of the Stock Yards Company are, and for many years

[1] This allegation in paragraph 19 of the complaint is in conformity with the provisions of the applicable tariffs under which the rates "named in such contracts" (the bills of lading) apply only "from or to industries, chutes or sidings of the Union Stock Yards & Transit Co., at Union Stock Yards," Section 10, page 129, Chicago Switching Committee Tariff No. 20-W; I. C. C. No. 442. In short, as stated in paragraph 19, the only delivery which defendants could lawfully have made at Union Stock Yards on the rates named and paid was that actually made, namely, delivery in the unloading pens of the Stock Yards Company.

have been, the common depot for the delivery of livestock at Union Stock Yards, Illinois, (pars. 3, 4) and the only such facilities at that point (pars. 7, 19), it cannot now be heard to deny, we submit, that a contract providing for the "usual place of delivery at destination" required delivery at the "common depot or station." The uniform livestock contract to which Armour directs attention is decisive against its contention.

F. Only at Public Stockyards Is Armour Entitled to the Unloading Service Which the Complaint Demands.

It is clear from the terms of Armour's demands in 1933 and from its complaint that it was expecting and insisting upon a delivery which included the unloading of the livestock by the carriers. This is entirely consistent with the demand actually made—that its shipments be delivered at the public stockyards. It is entirely inconsistent with the argument that Armour desired delivery at some other point.

In paragraph 6 of the complaint Armour cites and relies upon Section 15(5) of the Interstate Commerce Act, and declares that "railroads transporting livestock destined to, or received at, public stockyards are required to unload the same." (R. 7.) By its specific terms Section 15(5) requires the carriers to furnish the unloading service, without extra charge, at public stockyards only. (49 U. S. C. Sec. 15(5).) The plaintiff relied upon this section of the Act because it was demanding delivery at a public stockyards.

Paragraph 25 of the complaint states that the facilities and services of the Stock Yards Company which Armour has demanded or required since May 25, 1933, are those which are "incidental to the unloading, storage pending tender of delivery," etc., "all of which Defendants are required by their contract of transportation and by law to

provide for Plaintiff, as to each of such shipments." (R. 16.) This is a clear demand that the carriers provide unloading, a service performed only at public stockyards, coupled with the assertion that Armour demands or requires the facilities and services of the Stock Yards Company for that purpose. Unloading of the livestock is expressly mentioned or demanded in many other parts of the complaint. (Pars. 6, 8, 18, 19, 20, 26 and 28 at R. 7, 8, 12, 13, 14, 16, and 17.)

In its brief here in which it is seeking to set up a different case from that stated in its demands and in its complaint, Armour repeatedly argues that it demanded delivery "in pens." (See, for example, pp. 23-24.) Such statements in the plaintiff's brief are consistent with its complaint, since delivery in pens would necessarily include the unloading of the animals, a service performed only at the public stockyards, but they are not consistent with the interpretation plaintiff now seeks to place upon its complaint. In apparent recognition of this fact plaintiff actually denies at one point in its brief that it desired unloading. (p. 28.) The denial disregards both the terms of the complaint and the definition of the demand, in plaintiff's brief, as requiring delivery in pens. Delivery into pens is furnished only at public stockyards; at all other points the delivery is of the loaded car. As the Commission found in the *Swift* case "the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. *In the latter case, they unload the cars themselves.*" (R. 111.)

G. Armour's Refusal to Pay the Yardage Charges Did Not Qualify Its Demand for Delivery at the Stockyards.

What Armour did, as disclosed by its complaint, was clearly to signify its demand that its shipments be transported to and "delivered into suitable pens" at the Union Stock Yards. Its intention that this be done was clear despite its insistence that it not be required to pay the tariff charges of the Stock Yards Company on all animals so consigned to its stockyards. Armour's announcement that it would not pay the charge of the Stock Yards Company did not qualify its directions that these shipments be delivered at the Union Stock Yards. The case is similar in this respect to *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516 (1939), reh. den. 307 U. S. 649. In that opinion the Court through Mr. Justice Reed said:

> "On July 2, 1935, the respondent clearly signified its desire for cars fully coopered and ready for loading. Its letter of that date was an unconditional request for the petitioners' services for a sufficiently specified period of time—'from and after July 1, 1935.' The announcement that respondent would decline to pay for them in no way qualified the request for tariff services, and cannot now stave off liability. The petitioners could disregard this advance disclaimer of liability and rely upon the courts to enforce observance of the tariff. Until changed, tariffs bind both carriers and shippers with the force of law." (P. 520.)

Armour's objection to payment of the yardage charges did not modify its direction that the livestock be delivered at the Union Stock Yards.

H. Because This Case Is Identical With the Swift Case Uniformity in the Treatment of Shippers Would be Gravely Imperiled If This Case Were Decided Initially in the Courts.

It was only four days after the institution of this suit when Armour intervened in the *Swift* case. It was then that Armour first had occasion to place its own interpretation upon its complaint. It did so in the following simple straightforward statement to the Commission:

> "we have already invoked the jurisdiction of the courts on the same facts, and same subject matter by filing our suit as set forth in the petition." (Appendix this brief p. xv.)

This petition of intervention, which plaintiff discusses on page 32 of its brief, "concurs in, and adopts" the principal factual allegations of the Swift complaint. (Appendix this brief p. xvii.) A comparison of the Swift complaint, which has now been ruled upon by the Commission, and of the complaint here, shows them to be substantially identical not only in substance, but in terms. In this connection we direct the particular attention of the Court to paragraph X of the Swift complaint (Appendix this brief, p. xi) and paragraph 24 of the Armour complaint (R. 16) which state the respective demands of the parties almost in the same words. In short, the demands which are the basis of the two complaints were made in identical form, the complaints by which the parties seek to enforce their respective demands are the same in substance and effect, and Armour itself, before conceiving the theory upon which it here relies, took the definite position before the Commission that the facts in the two cases are the same.

Armour's effort to avoid the primary jurisdiction of the Interstate Commerce Commission over the issues of this case constitutes a very real threat to "that uniformity

which it is the purpose of the Commerce Act to secure."[1] It is unusual enough that one shipper should institute independent court proceedings at the very time that a competing shipper has instituted proceedings before the Commission on the same facts and seeking the same relief. But Armour has gone further; it has intervened in the proceeding brought by Swift before the Commission and actively participated in the trial of that proceeding, expressly recognizing and seeking advantage of the Commission's jurisdiction, while at the same time arguing to the courts that the Commission would not even have jurisdiction to determine the identical issues presented by its complaint. Its efforts have been consistent only with a purpose to avail itself of the Commission's decision, if favorable to the packers, while attempting to circumvent its effect if unfavorable. By this means it would achieve an advantage over its competitor, Swift, which has followed the customary and necessary procedure of submitting to the Commission in the first instance its contention that the long established delivery practice at the Chicago Union Stock Yards is unreasonable and therefore unlawful and should be changed.[2] There is no difference between the two cases in facts or in issues, and there is no merit in the claim of a misinterpretation of the complaint which,

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[1] *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292 (1922).

[2] One result of permitting a trial of the merits of this case in the courts would be that the trial would proceed before a jury or a single judge as a trier of the facts while a three-judge court contemporaneously was passing upon Swift's bill to review the Commission's decision. The essence of the doctrine of the *Merchants Elevator* Case, *supra*, and like cases is that eventual review by this Court of two such diverse proceedings could not assure uniformity of treatment of Armour and Swift. The rules of evidence, the view taken of the facts, and the scope of the review, to mention only three factors, would be materially different.

Armour admits, is the sole predicate of every one of its specifications of error.

It should be noted that the administrative problem is not only to maintain uniformity among the several packers, but also to prevent preferential treatment in respect to the packers' direct shipments, purchased in the country. Acceptance of the packers' demands would be to the prejudice of the shipments of the livestock producers who ship to the stockyards, electing to sell on the competitive market there rather than to sell to the packers at private sale in the country. (See p. 14, *supra*.)

When the complaint is properly given the interpretation placed upon it by the courts below, and initially by Armour itself (which is the same interpretation that the Commission has placed upon the complaint in the *Swift* case), Armour does not deny in this Court that there is an administrative question for the Commission. On the contrary, the existence of such a question would now seem to be tacitly admitted, but such an admission, if made, is not controlling, and we deem it proper, therefore, to present the authorities on the point here as was done below. In the same section of the brief we endeavor to show also that even on the interpretation of the complaint now urged by Armour, questions are presented which require preliminary resort to the Commission.

II.

THE COMPLAINT PRESENTS MANY ISSUES WHICH MUST BE DECIDED IN THE FIRST INSTANCE BY THE COMMISSION.

The complaint seeks a mandatory injunction requiring the carriers to change the established practice for the future by providing what the prayer describes as "suitable ingress" for plaintiff and "proper and reasonable egress for removal of its livestock * * * at the Union Stock Yards in Chicago, Illinois", without the payment by plain-

tiff of the yardage charges assessed against it in the tariffs of the Stock Yards Company. (R. 21.) The complaint also seeks allowances from the carriers to Armour equal to the yardage charges paid by Armour to the Stock Yards Company for a period in the past. Both a change in the practice for the future and the allowances for the past require the determination of administrative and factual issues which must necessarily be decided by the Commission in the first instance. We shall point out, moreover, that the necessity for preliminary resort to the Commission is clear even under plaintiff's present theory of the nature of the demands stated in the complaint.

A. The Decision of the Issue As to Where Transportation of These Shipments Ends Cannot Be Made By a Court in the First Instance.

The Commission's statement of this issue in the *Swift* case applies with full effect to the Armour complaint:

> "The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge." (R. 112.)

In deciding, after full consideration of the evidence, that transportation of direct shipments consigned to the packers at the Union Stock Yards ends with the unloading into the unloading pens, the Commission made the following statement as to the factors governing that decision:

> "For more than 50 years prior to the enactment of section 15(5) and since its enactment, usage and physical conditions combined to end transportation

on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice, but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own." (R. 120.)

Unless the scope of the transportation service should be held to be broader than the parties have always recognized it to be in the past, and broader than the Commission has held it to be, the facilities and services for which the tariff yardage charge of the Stock Yards Company is assessed are wholly separate from the transportation of the shipments and the duties of the carriers in respect to that service.

In dismissing the complaint, the District Court and the Circuit Court of Appeals have applied the rule repeatedly declared by this Court, that the determination of the limits of transportation under the circumstances present here is not a pure question of law to be decided by the courts from a mere reading of the tariffs, but is, instead, a technical inquiry dependent upon the determination of complex questions of fact by the Commission. The purposes of the Interstate Commerce Act can only be achieved by requiring prior resort to the Commission rather than permitting each court or jury to make its own decision, since review by appellate courts will not result in uniformity where issues of fact have been variously decided by juries or trial judges.

Among the cases which have determined that the issue whether a particular service of the character here involved is within transportation is not a pure question of law are two cases dealing directly with services at the Chicago Union Stock Yards.

In *Adams* v. *Mills*, 286 U. S. 397 (1932), this Court ruled that the question whether the unloading service performed by the Stock Yards Company at the Chicago Union Stock Yards was a part of the transportation service, was a question for the Commission and not for the courts. The question presented by the Armour complaint is identical in character with the issue in *Adams* v. *Mills*. There had been preliminary resort to the Commission in that case and the Commission had decided that the unloading was a part of the transportation service and that it was covered by the line-haul rate. Similarly, Armour seeks an order that the carriers have a duty to furnish additional services and facilities beyond the unloading pens and that compensation for those facilities and services is included in the line-haul transportation rate. In affirming the decision for the plaintiffs in *Adams* v. *Mills*, the Court, through Mr. Justice Brandeis, said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained." (pp. 409-410.)

The comparison suggested by the Court between the decision in *Adams* v. *Mills* and that in the *Merchants Elevator* case is of particular significance here. In the latter case, in which the opinion of the Court was also written by Mr. Justice Brandeis, it was held that where the decision required the mere reading of the tariffs, not involving the interpretation of technical words or any practices and

usages, a court could pass upon the question without a preliminary finding by the Commission. On the other hand, the Court stated:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. *It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission.* Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented, when the construction of any other document is in dispute." (p. 291.)

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"But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by *usage* to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the

> language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular *usage* existed." *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292 (1922).

In its opinion in *Adams* v. *Mills* the Court found that the question of whether a particular service of the Stock Yards Company was part of the transportation was not to be determined by "merely reading the tariffs" but was exactly the type of question which, under the rule stated in the *Merchants Elevator* case, must have the primary determination of the Commission. That finding applies here.

A few years later, the Court applied the rule in a case presenting the very facts which are again involved here, *i. e.*, whether transportation of shipments of livestock consigned to packers for delivery at the Chicago Union Stock Yards includes the removal of the animals from the unloading pens to the boundaries of the Union Stock Yards, and whether the customary tariff charge of the Stock Yards Company for the use of the facilities necessary for such removal, in addition to the line-haul rate, is unlawful. *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935) (commonly referred to as the *Hygrade* case). The procedure followed there was exactly that followed in the *Swift* case to obtain a determination of the same issue. The case was not presented to a court until after the Commission had made its findings and issued its order. This Court took jurisdiction of the case, thus recognizing that the procedure followed had been the proper one, and ruled in favor of the carriers. That the decision of the issues necessarily involves considerations other than a mere ruling of law, is shown by the Court's stress in that case upon: "Long continued practice and

special conditions'' and ''usage and physical conditions''.[1] (pp. 200, 201.)

This Court has held that these are matters which require an administrative determination by the Commission for the reasons stated in the quotation above from the *Merchants Elevator* case. Commenting very recently upon its decision in the *Hygrade* case, just cited, the Court said that the Commission's order therein was set aside on the sole ground that the Commission's findings were inadequate. *Union Stock Yard and Transit Co.* v. *U. S.*, 308 U. S. 213, 219 (1939).

The character of the question and the need for preliminary resort to the Commission are the same whether the beginning or the end of the transportation service is concerned. In *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247 (1913), the question was where transportation began with respect to certain shipments of coal.

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[1] As we have pointed out, Armour advised the Commission that this case involves the same facts and subject matter as the *Swift* case, but now asserts that the facts in the two cases are entirely different. Petitioner has similarly shifted its position respecting the *Hygrade* case. In the Circuit Court of Appeals Armour relied upon the Commission's findings in both the *Swift* case and the *Hygrade* case as constituting the necessary administrative determination of the question here. In a supplemental brief in the court below filed January 25, 1940, Armour concluded its discussion of the *Hygrade* case as follows:

> ''From the above, it is apparent that plaintiff here demands no more than the Commission had already found to be reasonable, at these same yards, from these same defendants.
>
> ''It follows that the only question of the reasonableness of anything, which might be conjured into this case, has been passed upon by the Commission, *and plaintiff need not present the same question to the Commission again.*'' (p. 25)

In its brief in this Court, however, petitioner argues that the question in the *Hygrade* case was a wholly different question from that presented here. (pp. 19-26.)

The plaintiff argued that transportation began at the station and not at the mines. The Court held that the action could not be maintained without preliminary resort to the Interstate Commerce Commission, saying:

> "But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight.
>
> "In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act." (pp. 263, 264.)

This decision is directly applicable to the present case. The plaintiff by this suit is attacking the reasonableness of the established practice, asserting that the transportation service and the rates to the Union Stock Yards do not end with the unloading. Plaintiff cites no precise provisions in the tariffs that may be relied upon to give a solution of such problems. These complex and technical questions, as the Court declared in the *Mitchell* case, must be decided by the Commission in its primary jurisdiction rather than by the courts.

Another recent Supreme Court ruling that the determination of the extent of transportation is a matter for the Commission and not for the courts, is *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402 (1937). There the Commission had decided that the spotting of cars on industrial plant tracks was not part of the transportation service and had ordered the railroads to cease rendering the service under their line-haul rates. The decision of the District Court setting aside the Commission's order was reversed by this Court, which said:

> "The Commission is clearly empowered to deter-

> mine what is embraced within the service of transportation and what lies outside that service."[1] (p. 408.)

This decision was relied upon and followed in *United States v. Pan American Petroleum Corp.*, 304 U. S. 156 (1938). The *Los Angeles Switching Case*, 234 U. S. 294 (1914), is to the same effect.

In a similar case, the Court in *Louisville Cement Co. v. U. S.*, 19 Fed. Supp. 910 (D. C. W. D. Ky., 1937), refused to set aside the order of the Commission, saying:

> "It is frequently difficult to determine when delivery is completed or transportation begun. It is a question of fact, and the Interstate Commerce Commission is peculiarly fitted to determine at what point the carrier has begun or completed straight transportation.
>
> • • • • •
>
> "The Commission had the authority to determine in the instant case where transportation under the line haul charge ended." (p. 916.)

These cases hold that the question of whether the facilities and services of the Stock Yards Company beyond that Company's unloading pens are a part of transportation and should therefore be provided by the line-haul carriers is not a proper one for the determination of a court in the first instance. It does not depend upon the mere reading of a tariff. It depends, rather, upon the usage and practice, upon the history of the relations of Armour and the other packers to the practice, and upon the peculiar physical conditions at the Union Stock Yards.

The significance of these factors in the determination of

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[1] The Court also said: "The Commission found that line-haul rates had not been fixed to compensate the carriers for the services in question." (p. 404.) The Commission has made an identical finding in the *Swift* case as follows: "They [the defendants] have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens." (R. 111.)

this case is apparent from the Commission's report in the *Swift* case.[1] (R. 100, *et seq.*) As there disclosed, the participation of the packers in the practice of which they now complain has not been limited to acquiescence over a long period of years. Instead, the usage and practice have been confirmed by affirmative agreements between the packers and the Stock Yards Company, which are vital to the decision of this complaint. The physical conditions are also shown by that report to be of great importance here. These include the surrender by Armour of its own pens and facilities for receipt of its direct shipments on its own tracks in Chicago, in consideration of large payments from the Stock Yards Company. They also include Armour's agreement with that Company that as long as the Company conducts its stockyards business at Chicago, Armour will never receive livestock at any point in Chicago, other than at the Union Stock Yards. (R. 110, 111.) Such factors as these show that the question whether transportation of plaintiff's shipments ends at the unloading pens at the Union Stock Yards or continues beyond them is not a pure question of law. Preliminary determination by the Commission is necessary both to secure uniformity of treatment of shippers and to obtain the judgment of the administrative body in respect to an inquiry which "is essentially one of fact and discretion in technical matters." *Merchants' Elevator Case, supra.*

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[1] This Court has heretofore examined the Commission's reports to determine whether the question before it was of such a character as to require administrative action. *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43 (1916); *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477 (1918).

B. The Determination of the Kind of Delivery Facilities and Services Which Would Be "Suitable" and "Proper and Reasonable" or Otherwise Adequate to Meet the Obligations of the Defendants Requires Preliminary Resort to the Commission.

Plaintiff argues that the Uniform Live Stock Contract set out in full in the complaint contemplates a delivery at destination. (Brief, pp. 40, 41.) This argument is beside the point. Delivery is contemplated and all the shipments here involved have been delivered. But the complaint requires a decision on the issues of exactly where and in what manner the delivery is to be made, exactly what delivery facilities and services are "proper and reasonable" and what facilities are "suitable." (Complaint, R. 21.) The answer to these issues is not to be found by a mere construction of the tariff or of the Uniform Live Stock Contract. They lie within the field of administrative determination.

The question of the kind of facilities which a carrier must furnish in connection with delivery is no different in character from the question of the kind of facilities to be furnished in connection with any other part of the railroad service. In *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43 (1916), the carrier had discontinued its practice of supplying lumber for bins and bulkheads in freight cars. The plaintiff shippers then fitted the cars to serve their needs and sued for the cost of the materials, without preliminary resort to the Interstate Commerce Commission. Their theory was "that the carrier having failed to perform its common law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay." (p. 47.) Thus their claim was identical in principle with that of appellant in the present case,—the claim that the carriers have failed to perform their common law duty to furnish adequate facilities for delivery and that

they are therefore entitled to recover their consequent outlay. By a unanimous opinion this Court held:

> "An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. * * * And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court." (p. 50.)

This decision governs the present case. In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1921), Mr. Justice Brandeis, speaking of the *Loomis* case, said:

> "The tariff was silent on the subject. The controverted question was not how the tariff should be construed, but what character of equipment should be deemed reasonable." (p. 294.)

The decision of the Circuit Court of Appeals for the 8th Circuit in *J. C. Famechon Co.* v. *Northern Pac. R. Co.*, 23 F. (2d) 307 (1927), illustrates the application of the rule of the *Loomis* case by the lower courts:

> "The character of equipment which the carrier must provide is a problem which directly concerns rate-making, is administrative in character, and on it there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court. *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517." (p. 310.)

The complaint alleges that "for many years" (actually for about 70 years) "the transportation had been completed" and "the contract therefor completely performed" by delivering into pens in the Union Stock Yards. (Par. 15, R. 10.) The questions of the exact point at which and the man-

ner in which delivery should be made at the Union Stock Yards, and the character of the terminal facilities and equipment required to be furnished by the railroads in connection with that delivery which would be, in the words of the complaint, "suitable" or "proper and reasonable," depend upon what should be deemed reasonable under the particular circumstances and in view of the established practice, the history, and the physical conditions. These issues must be determined primarily by the Commission if the benefits of the Commission's expert administrative experience are to be obtained and if uniformity of treatment of shippers and prevention of discrimination are to be preserved.

C. The Complaint Demands the Payment of Allowances to a Shipper Which Can Be Authorized Only By the Inter-State Commerce Commission.

There is another conclusive reason why this complaint must go to the Commission before it is presented to the courts. The payments demanded by Armour in connection with past shipments would constitute allowances from the railroads to a shipper, tantamount to a rebate from the line-haul rate. Not being provided for in the tariffs, such payments would be illegal under the terms of Section 6(7) of the Commerce Act, which reads, in part, as follows:

> "* * * nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." (49 U. S. C. Sec. 6(7).)

The shipper's recourse is to secure an allowance by the authority of the Commission pursuant to Section 15(13) which provides:

"If the owner of property transported under this

part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be (published in tariffs or schedules filed in the manner provided in this part and shall be)[1] no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." (49 U. S. C. Sec. 15(13).)

Armour complains that the defendant carriers refused to furnish the services and facilities involved in the removal of the animals from the unloading pens to the boundaries of the Union Stock Yards. Because of this, Armour itself furnished those services and facilities "directly or indirectly," through its payments to the Stock Yards Company. It seeks here to recover its costs for furnishing those services and facilities. On the theory of the complaint, they are a part of the transportation which the defendants would otherwise have had to furnish. It appears from the face of the complaint that there is no provision in the tariffs authorizing such allowances to a shipper. The determination of the justness and reasonableness of a charge for the rendering of transportation services or the furnishing of instrumentalities "directly or indirectly" by the shipper is an administrative or legislative function. By Sec. 15(13) of the Act it is a function committed exclusively to the Commission.

In *Loomis* v. *Lehigh Valley Railroad*, 240 U. S. 43 (1916) (discussed above at pp. 49-50) the shippers' suit against

[1] Words in parentheses added by the Transportation Act of 1940, approved September 18, 1940. (Pub. L. No. 785, 76th Cong., 3rd Sess., Title I, Sec. 10 (d).)

the carrier for the cost to the shippers of certain facilities which, it was alleged, should have been furnished by the carrier under the line-haul rate was held to be improperly maintained in the absence of a preliminary ruling by the Commission. The decision was based not only upon the ground that the determination of the character of equipment to be provided by a carrier must be made in the first instance by the Commission but also upon the ground that the payment of the claims would constitute "allowances" to shippers. In the portion of that opinion set out above at p. 50 the Court stressed the fact that the case involved "allowances which it [the carrier] may make to shippers for instrumentalities supplied and services rendered." In this case, as in the *Loomis* case, the shipper's claim for the cost to it of providing facilities and services which the carriers allegedly should have furnished is a claim for allowances. Preliminary resort to the Commission is necessary here just as it was in the *Loomis* case.

At the last term, this Court again held that suit may not be maintained by a shipper to recover allowances from the line-haul rate, regardless of the form of those allowances, until the Commission has first decided that they were lawful and reasonable. *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422 (1940).

The policy behind the requirement that the Commission determine the justness and reasonableness of allowances to shippers is the fundamental purpose of the entire Act—namely, the preservation of uniform treatment of shippers. If the defendant carriers had departed from the long-settled practice and had voluntarily paid to Armour on each of its shipments the amount of the yardage charges which Armour had paid the Stock Yards Company pursuant to the latter's published tariff, either by a direct payment or by a set-off against the line-haul rate, the carriers would have been subject to penalties for violating

the Act. Such payments would have been rebates, made illegal under the Elkins Act (49 U. S. C. Sec. 41 (1)) and would also have constituted unjust discrimination in favor of Armour, contrary to Section 2 of the Interstate Commerce Act (49 U. S. C. Sec. 2).

This Court has repeatedly held that where payments to shippers cannot be made voluntarily without prior action by the Commission, the courts will neither compel the making of such payments nor allow their retention by shippers if they have already been made. In *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478 (1939) reh. den. 308 U. S. 631, the rule was summarized as follows:

> "The Act condemns every deviation from lawful tariff rates. It declares that no carrier may lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. § 6 (7); see also § 10 (2). Similarly, it condemns the obtaining of transportation for less than the legally established rate. See § 10 (3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 582. *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406. By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive." (pp. 484-485)

The case is directly parallel on this point to *Fulton Bag & Cotton Mills* v. *American Ry. Express*, 288 Fed. 854 (D. C. N. D., Tex., 1923). There the carrier had refused to furnish to plaintiff the pick-up service which it was alleged the carrier was obligated to furnish as part of the transportation service. The plaintiff's suit to recover its costs for providing this service after the defendant had refused to provide it was dismissed because the Commission (under the exclusive authority vested in it by Sec-

tion 15 (13)) had not previously ruled that the allowance demanded was reasonable. The Court stated:

> "What the parties themselves could not do voluntarily—what they could not peaceably and nonlitigiously do—certainly this court would not compel nor order them to do." (p. 859)

Another decision to the same effect is *Finkbine Lumber Co.* v. *Gulf & S. I. R. Co.*, 269 Fed. 933 (C. C. A. 5, 1920), certiorari denied, 255 U. S. 574.

Since the carriers did not furnish the services and facilities beyond the unloading pens as demanded by plaintiff, Armour itself, on the theory of the complaint, furnished them "directly or indirectly" by its payments to the Yards Company. Compensation from the carriers to this shipper for furnishing these facilities and services would constitute allowances from the line-haul rate. In the absence of a Commission determination of the "justness and reasonableness" of such allowances, the courts may not require their payment. To do so would be to aid Armour in the recovery of an involuntary preferential rebate.

D. The Allowance of the Damages Requested Would Require the Court to Decide Whether the Rates Paid By Armour Were Unreasonably High for the Services Performed, and If So, What the Exact Amount of a Reasonable Charge Would Have Been at the Different Times the Shipments Were Made.

Assuming, for discussion, that transportation does not terminate at the unloading pens, and as Armour contends, that the carriers are responsible for providing facilities and services for the removal from the premises of the Union Stock Yards Company, nevertheless the plaintiff has sustained no damage unless it has been required to pay more than a reasonable charge for the use of these facilities. Before determining the amount of any allow-

ances or damages to be paid to Armour, the court would be required to decide whether the charge paid by plaintiff for the services received was unreasonable. Such a question can be decided only by the Commission in the first instance and not by a court.

Armour never paid the defendant carriers for any services or facilities beyond the unloading pens. The line-haul rates have never contained any compensation for those services or facilities, since they have never been furnished by the line-haul carriers which receive those rates. This is established by the finding in the *Swift* case, quoted at pages 11-12 of this brief and Armour's complaint confirms the Commission's finding. It is established by the allegations of paragraph 15 of the complaint that the line-haul tariff rates do not compensate defendants for any service beyond the unloading. (R. 10-11.) It is there alleged that "for many years prior to May 25, 1933" the defendants completed the transportation of the livestock and "the contract therefor had been completely performed" by delivering the livestock without providing any services or facilities beyond the unloading pens. It is thus recognized that "for many years prior to May 25, 1933" the Uniform Live Stock Contract did not contemplate any service by defendants other than that now performed. Obviously the tariffs then in effect included no compensation for any such additional service. It is not alleged that any change has been made in the tariffs since May 25, 1933, to cover the additional services demanded of the defendants since that date, and it appears on the face of the Uniform Live Stock Contract itself, which is in the form prescribed by the Commission, that it has remained unchanged since the year 1930. (R. 23; see also par. 19, R. 13.)

It is thus established, both by the finding of the Commission and the allegation of the complaint, that Armour has never paid anything to the defendant line-haul carriers for

services beyond the unloading pens. The fact that the Stock Yards Company assessed and collected charges from Armour for the use of facilities and services beyond those pens could not possibly have damaged Armour unless the aggregate charge was unreasonably high. If the yardage charges were reasonable in amount, Armour has merely been paying a reasonable line-haul rate to the defendants for the transportation to and into the unloading pens, and a reasonable charge to the Stock Yards Company for the "transportation service" (assuming plaintiff's theory) rendered beyond the unloading pens. In that event it has suffered no damages whatsoever.

It seems to be plaintiff's view that it would be unnecessary for the court to determine the exclusively administrative question of the reasonableness of the yardage charge on the theory that if transportation continues through and beyond the unloading pens to the boundaries of the Union Stock Yards, the entire amount of those charges could be recovered from the line-haul carriers because the yardage charges were not published in the tariffs of the Yards Company filed with the Commission but were filed instead with the Secretary of Agriculture. This contention is in conflict with the settled rule, both under the Act and at common law.

As long ago as 1897, in *Parsons* v. *C. & N. W. Railway Co.*, 167 U. S. 447, this Court held that a shipper must prove he has been injured before he is entitled to recover damages. The Court said:

> "The only right of recovery given by the interstate commerce act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act.' So, before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." (p. 460.)

In *News Syndicate Co.* v. *New York Central R. Co.*, 27
U. S. 179 (1927), the issue was the amount of damages re
sulting from the failure of the carriers to publish a rat
applicable from the Canadian border to New York City
As a result of that failure, the shipper had been require
to pay the through rate from a point in Ontario. Thi
Court held that the Interstate Commerce Commission ha
jurisdiction to determine the reasonableness of the throug
rate since only by finding whether the shipper had paid a
excessive charge could it be determined that the shippe
had suffered any damage. The Court said, in part:

> "The Interstate Commerce Act applies to the line
> that carried, and to the transportation of, the pape
> from the international boundary to New York City
> § 1(1) and (2). It was the duty of defendants in erro
> to establish just and reasonable rates for that service
> § 1(5), § 6(1) and (7). They failed to make or pub
> lish any rate applicable to that part of the transpor
> tation. Section 8 makes them liable for damages sus
> tained in consequence of such failure. *Had the throug*
> *rate been just and reasonable, no damages would hav*
> *resulted to plaintiff in error.*" (p. 186.)

Similarly, in *Great Northern Ry.* v. *Sullivan*, 294 U. S
458 (1935), it was held that proof of a carrier's violatio
of the Interstate Commerce Act did not afford a basis fo
recovery by a shipper unless the total amount paid by th
shipper was unreasonably high. The Court said:

> "But the Commission may not order or permit pay
> ment of damages by way of reparation without find
> ing that the amount of the charge was unjust and un
> reasonable. *News Syndicate Co.* v. *N. Y. Central R*
> *Co., supra*, 187." (pp. 462, 463.)

The same rule has been frequently applied in suits be
fore the Commission. In *Long Beach Chamber of Com
merce* v. *Los Angeles and S. L. R. R. Co.*, 171 I. C. C. 14
(1930), switching charges had been levied in addition to th

line-haul rate. No such additional charges were provided for in the tariffs. The Commission said:

> "It therefore becomes necessary to determine what would have been reasonable charges for the transportation services rendered." (p. 147.)

Similarly, in *Crenshaw Brothers Produce Co.* v. *Seaboard Air Line Railway Co.*, 177 I. C. C. 501 (1931), weighing charges had been collected which were not contained in the tariffs. The plaintiff claimed that the whole amount of the charges should be refunded as the amount of its damages. As to this the Commission said:

> "This contention is without merit. Certainly there are no damages in any proper sense of the word unless the shipper has been compelled to pay more than a reasonable charge." (p. 502.)

An early case in which the same ruling was made with respect to an additional charge to cover refrigeration in transit, no such charge being contained in the tariffs, is *Memphis Freight Bureau* v. *Kansas City Southern Railway Co.*, 17 I. C. C. 90 (1909).

The plaintiff cannot escape this rule by its assertion that the cause of action on which it is suing is one at common law. Under the common law, a plaintiff objecting to a charge made by a carrier could not recover unless he could prove that the rate paid was unreasonably high. The common law rule was summarized by the Court in the *Abilene* case as follows:

> "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an *unreasonable* sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an *unreasonable* exaction as a condition of the delivery of the goods, an action could be maintained to recover *the excess over a reasonable charge.* And it may further be conceded

> that it is now settled that even where, on the receipt of goods by a carrier, an *exorbitant* charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the *overcharge.*" *Texas & Pacific Ry. Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436 (1907).

The Court, following this portion of the opinion, pointed to the destruction of uniformity which must follow a determination of such issues by different courts, and held that Sections 9 and 22 of the Act, on which Armour relies, could not be interpreted as preserving primary jurisdiction in the courts in such cases.

Whether Armour's action be regarded as a complaint for violation of the Interstate Commerce Act or for violation of the common law, the determination of damages would necessarily require the determination of whether the total charges were unreasonably high. Only the charge in excess of a reasonable rate can be recovered. Ever since the *Abilene* case, it has been settled that the reasonableness of an interstate transportation rate must be decided primarily by the Commission and not the courts. The Court has tersely stated the rule as follows:

> "But no action for damages alleged to have been caused by the exaction of excessive rates for interstate transportation can be maintained in any court, state or federal, in the absence of a prior finding by the Commission that the rate charged was unreasonable." *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661 (1931).

A recent case directly in point is *Aron* v. *Pennsylvania R. R. Co.*, 80 F. (2d) 100 (C. C. A. 2d 1935), certiorari denied, 298 U. S. 658. There, suit was brought by certain packers, who, like Armour, had shipped livestock consigned to themselves, and like Armour, sought to recover a yardage charge of a stockyards company paid by them for services which they claimed were a part of transportation. The

charge had not been absorbed by the railroad and had been collected in addition to the line-haul rate. The yardage charge was not on file with the Interstate Commerce Commission. The Circuit Court of Appeals for the Second Circuit affirmed a judgment for the defendant, on the ground that a preliminary resort to the Interstate Commerce Commission was necessary and had not been made. The Court held that even if it were assumed that the charge was made for services which constituted a part of transportation, the plaintiffs had not been damaged unless they could show they had paid an amount in excess of the reasonable charge for these services. The Court said:

> "The appellants did not, as they contend, suffer damages in the entire amount paid, but only in so far as the amount charged exceeded a reasonable rate for the services rendered." (p. 102)
>
> • • • • •
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> "The commission, in making reparations for unspecified and unscheduled charges, has limited recovery to excess over a reasonable charge for services. (citing cases.)
>
> "The determination of damages in the instant case involves a finding of a reasonable rate, and the court will not determine that question without a prior finding by the commission. Although section 9 (49 U. S. C. A. §9) gives an apparently clear right to sue, the courts in the interest of uniformity have declined to accept the decision of questions involving functions essentially belonging to the commission." (p. 103).

E. The Interpretation Which Armour Now Seeks to Place Upon Its Complaint Does Not Avoid the Necessity for Preliminary Resort to the Commission.

The theory which Armour has evolved in an effort to avoid the necessity of preliminary resort to the Commission, is that it forbade the delivery of its livestock to the Union Stock Yards as long as the Stock Yards Company continued the assessment and collection of its tariff yard-

age charges against Armour on those shipments. The demand against the carriers, on this theory, was that they provide facilities and make delivery to Armour at some point at Union Stock Yards, Chicago, Illinois, other than the public stockyards.

To urge this contention, Armour necessarily ignores its explicit definition of the "station or depot," Union Stock Yards, as that term is used in the complaint, as consisting solely of the facilities and property of the Yards Company. (Complaint, pars. 3, 4; R. 5, 6.) By that definition together with the allegations of paragraphs 24, 25 and 26 of the complaint, Armour alleges that it demanded delivery through the facilities of the Yards Company. This is the conclusive answer to the contention in Armour's brief that delivery was demanded anywhere else.

Consistently with the allegations referred to, and by allegations equally explicit, the complaint twice declares that the carriers did not, and do not, own or operate any pens, chutes or other facilities for the delivery of Armour's shipments at the station, Union Stock Yards, and that shipments of livestock to that station could be unloaded and delivered only by the use of the property and facilities of the Stock Yards Company. (See pars. 7, 17, 19 at R. 7, 11, 13, respectively.)

Faced with these allegations of fact Armour has taken pains in stating its present theory to insist that delivery should have been made through some facilities at the Union Stock Yards, other than those of the Yards Company, facilities which it has alleged do not exist, "*or* by the construction or leasing of carrier owned pens within the station limits, at a point removed from the public stock yards" (Brief, p. 25) "*or* at newly constructed pens of their own." (Brief, p. 30.) Plaintiff's theory thus ignores certain vital allegations of the complaint and recognizes others. It ignores the positive allegations that delivery was demanded

through the facilities of the Stock Yards Company, but it recognizes the absence of "other facilities necessary for the unloading, holding until tender of delivery, and the delivery of livestock, at Union Stock Yards, Illinois" (par. 7, R. 7; par. 17, R. 11; par. 19, R. 13), and finally rests on the contention that the carriers could have made delivery by constructing or acquiring delivery facilities of their own at the station, Union Stock Yards, away from the public stockyards, and thus have permitted Armour to receive its shipments within that station without paying the yardage charges of the Yards Company. (Armour's Brief, pp. 25, 26, 30.) The character of such a demand (never actually made) may be seen from the fact that even if the use of the new facilities which Armour says it demanded had been restricted to Armour's shipments alone, they must have been equipped to handle more than ten million head or ninety thousand cars of livestock during the five-year period preceding the filing of this complaint. (Par. 31, R. 18.) The present suit, on plaintiff's theory of the complaint, therefore, is to obtain an injunction forcing the carriers to construct such facilities, and to obtain damages by reason of the carriers' failure to construct and provide them in the past. Both elements of such a demand would require preliminary administrative action.

In *Loomis* v. *Lehigh Valley Railroad Co.*, 240 U. S. 43 (1916), discussed above at page 49, this Court held that the demand of shippers that the carrier provide equipment for bulkheads in freight cars presented a problem which directly concerned rate making and was peculiarly administrative. Preservation of uniformity and prevention of discrimination, it was held, required preliminary resort to the Commission. *A fortiori*, that rule applies to a demand that the carriers construct and provide in Chicago new delivery facilities capable of handling Armour's own shipments of at least two million head of livestock each year.

The discretionary element present in the decision upon any demand that the carriers construct and provide additional delivery facilities for livestock is accentuated here by the fact that there are other points in Chicago to which Armour had and now has the tariff option of consigning its shipments and receiving them without the payment of any yardage charge. (R. 111-112.) At the particular station, Union Stock Yards, Chicago, Illinois, to which Armour's shipments are consigned, the complaint itself alleges that the only facilities for livestock delivery are the property and facilities of the public stockyards. But before the carriers could be required to construct the extensive pens demanded by Armour at some other point, there would have to be an administrative judgment upon the adequacy of the other delivery facilities in the Chicago district, which are available to Armour if it chooses to use them under its tariff option. (R. 111-112.) This is a question for the Commission.

The exercise of the rate making function which would be necessary to a determination of the question presented by plaintiff's theory of the case is even more direct than in the *Loomis* case. The complaint recognizes, and explicitly alleges the fact (par. 19, R. 13) that the Bill of Lading rates applicable to and paid on its shipments applied only to shipments delivered at the Union Stock Yards, *i. e.*, the existing facilities of the Stock Yards Company. Those facilities, by the express terms of the complaint, are the only facilities for the unloading and delivery of livestock at that "station." Rates applicable to some other facilities would have to be established, and, if the carriers were to construct the extensive facilities demanded by Armour,[1] such rates might well be different from those now in effect.

[1] Armour's theory ignores, also, the practical consideration of whether or not the physical situation would permit the construction of any such facilities in this congested area.

No one knows what the amount of a reasonable rate to such a point or points would have been, but it would be necessary to fix such a rate in order to allow damages here, assuming plaintiff was entitled to damages on its theory of the complaint. Unless the line-haul rate to the facilities at the public stockyards, plus the amount of the yardage charges, exceeded the amount of the unknown reasonable rate to the points where Armour contends that the carriers should have provided facilities and made delivery, the carriers' failure to construct and provide the delivery facilities demanded by Armour has not resulted in any damage even in Armour's own theory of the case. The fixing of a reasonable rate is necessary to the success of Armour under its theory of the complaint, and the performance of the rate making function is primarily for the Commission, not the courts. Moreover, all that has been said concerning the need for a decision by the Commission on the making of an allowance by the carriers to Armour applies with equal force to the theory which Armour now seeks to sustain. (See pp. 51 to 55, *supra.*)

It should be pointed out, too, that on Armour's theory the complaint requires a finding not only as to the facilities which would be adequate, and the rate applicable thereto, but a finding also as to the station limits within which such facilities would be established. It is settled law that uniformity in the determination of such an issue can be had only by preliminary resort to the Commission. See *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247 (1913), discussed above at pp. 45-46.

Armour's theory of the cause of action, therefore, is not only in direct conflict with the allegations of the complaint, but like the complaint itself raises questions requiring administrative action by the Commission.

Armour objects to the finding of the Circuit Court of Appeals that this suit is one for damages occasioned by

an alleged overcharge, and that the determination whether or not there was any overcharge requires primary resort to the Commission because of the nature of the issues and the character of the inquiry. (Brief, pp. 28-31.) It is admitted in that discussion, however, that the sole basis for its objection to those findings is its claim that the two lower courts have misinterpreted the complaint. The first answer is that there was no misinterpretation. Plaintiff's present theory of the facts of the case is contrary to the clear allegations of the complaint and squarely opposed to Armour's original position. Moreover, even on Armour's theory, there would exist the factual and administrative questions discussed above, which themselves would require primary determination by the Commission.

III.

THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION TO DECIDE THIS CASE. IT IS NOT AN ACTION FOR LOSS OR DAMAGE TO THE SHIPMENTS.

Armour's argument against the exclusive primary jurisdiction of the Commission is such that it is forced to argue that the Commission would not even have concurrent jurisdiction. This contention is advanced on the theory that no violation of the Interstate Commerce Act is involved here (Plaintiff's brief in support of petition, August 1, p. 17) and that this suit is merely one for "loss and damage." (Plaintiff's brief, December 2, pp. 33-35.) Both theories are at variance with the facts.

A. This Case Involves Alleged Violations of the Interstate Commerce Act.

In Armour's view, the necessity for preliminary resort to the Commission depends not at all on substance, on the fundamental character of the question actually presented, but purely upon the form which the pleader may give to

his complaint. The complaint in the *Swift* case specifically alleges that the exaction of the yardage charge constitutes an unreasonable practice in violation of Section 1 of the Interstate Commerce Act. (Appendix this brief, p. xii, par. XII). Intervening in that proceeding in support of the complaint, Armour advised the Commission that that case and this case involved the same facts and subject matter, and its petition of intervention, signed by its counsel and verified by its Vice President, alleges in paragraph VI in part as follows:

> "That as a result of said action [the institution of this cause] by Petitioner, it is not necessary to complain here of the fact that, as to Petitioner's shipments, *such repeated breaches do constitute an unreasonable practice as alleged in the complaint herein.*" (Appendix this brief, p. xviii.)

Armour has thus formally asserted before the Commission that the acts here complained of do constitute an unreasonable practice in violation of Section 1 of the Interstate Commerce Act, exactly as did Swift. The position which it is now forced to take, therefore, is that it has found a way to state the same cause of action here in such form as wholly to distinguish this case from the *Swift* case, to compel a different procedure from that governing the *Swift* case, and finally to obtain different treatment from that accorded Swift. Fundamental rights are not so determined. It is the substance and actualities which govern and not the form. This Court has so held. (See cases cited below, p. 72.)

The showing that Armour's claim actually involves a violation of the Interstate Commerce Act does not rest, however, on its sworn pleading in the proceeding before the Commission. Violations of the Interstate Commerce Act are necessarily implicit in the complaint here.

If the established practice of making deliveries at the Union Stock Yards, by which the defendant carriers' responsibility terminates at the unloading pens at the

yards, is not both "just and reasonable" and is not all that is "necessary or proper to secure the safe and prompt * * * delivery of property," then there is a violation of the Act. Section 1(6) of the Interstate Commerce Act provides with respect to practices affecting delivery of property as follows:

> "It is hereby made the duty of all common carriers * * * to establish, observe and enforce just and reasonable * * * practices affecting classifications, rates, or tariffs, * * * the manner and method of * * * delivering property for transportation, the facilities for transportation * * * and all other matters relating to or connected with the * * * transporting, storing and delivery of property * * * which may be necessary or proper to secure the safe and prompt * * * transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable * * * practice is prohibited and declared to be unlawful." (49 U. S. C. Sec. 1(6).)

On Armour's theory that defendants should be required to construct extensive new livestock pens and facilities away from the Union Stock Yards but within the station "Union Stock Yards," the failure of the carriers to build and provide such facilities is a violation of this section, should it be determined that they were reasonably necessary to provide proper delivery. If, as Armour argues, there is no violation of the Act involved in the allegations of the complaint, then the established practice must be "just and reasonable" and must be all that is "necessary or proper." But Armour, obviously, would never agree to this, for to do so would be to admit that plaintiff has no complaint on any theory. There is necessarily involved here the issue of whether the delivery practice at the Chicago Union Stock Yards is just and reasonable or whether the carriers are failing to establish just and reasonable practices affecting the delivery and are therefore violating the Act.

The complaint also contains repeated assertions that the yardage charges collected by the Stock Yards Company, and which are published by it with the Secretary of Agriculture, were not on file with the Commission. (See Paragraphs 8, 19, 21, 28 and 31 of the complaint, at R. 8, 13-14, 15, 17 and 19.) Armour contends that these yardage charges have been assessed for the use of services and facilities which are an integral part of the transportation service. The allegations that the charges were collected for transportation services and facilities without being filed with the Commission are direct allegations that Section 6(7) of the Interstate Commerce Act, which forbids the collection of an unpublished charge for transportation services, has been violated. (49 U. S. C. Sec. 6(7).) As shown above, the determination of whether the services for which the charges were collected were transportation services and whether, if so, Armour has suffered any damage from such violation of Section 6(7), requires the determination of administrative questions by the Commission.

Not only is reliance upon a violation of the Act necessarily implicit in the complaint, but there is express reliance, as well. Armour specifically relies upon Section 15(5) of the Act and its reliance on this section shows that an alleged violation of the Act, over which the Commission would have jurisdiction, is involved in the complaint. (It also further proves these shipments to have been consigned to the public stockyards, contrary to Armour's present argument, since that section applies only to public stockyards.)

These alleged violations of the Act are within the jurisdiction of the Commission. If it is true that the established practice respecting delivery of livestock at the Chicago Union Stock Yards is not just and reasonable, and that the yardage charges complained of as not being filed with

the Commission are for services and facilities which should be included within "transportation," then the Commission is expressly authorized to grant the same character of relief sought by Swift before the Commission and sought by Armour in this case, namely, an order requiring a change in a regulation or practice for the future (49 U. S. C. Sec. 15(1)), and the payment of damages for the past. (49 U. S. C. Sec. 16(1).) It is also expressly authorized to determine the reasonableness of the allowance to be paid by carriers for services or facilities directly or indirectly furnished by a shipper in connection with transportation. (49 U. S. C. Sec. 15(13).)

The complaint states the same grounds for relief as those stated by the Hygrade Company in its action before the Commission, summarized by this Court as follows:

> "It claims that the service covered by the charge is included in transportation, § § 1(3), 15(5); that, not being specified in carriers' tariffs, they are unlawful, § 6; and that the practice of the carriers and Yards Company in making the stockyards their depot for delivery of livestock pursuant to an arrangement by which the Yards Company imposes a yardage charge is an unjust and unreasonable practice in violation of § 1." *Atchison T. & S. F. Ry.* v. *United States,* 295 U. S. 193, 195.

As shown above, the Commission's jurisdiction in these matters is not concurrent but exclusive.

B. This Is Not a Loss and Damage Suit.

Armour repeats in this Court its attempted justification of primary jurisdiction in the courts on the ground that the complaint should be interpreted as stating a cause of action for loss and damage. (Armour's Brief, pp. 33-35.) From the foregoing discussion of the issues presented by the complaint, it is apparent that this is no mere loss and damage suit. The complaint does not charge that the

animals were lost, damaged, or injured, and there is no attempt to recover either their value or the depreciation in that value resulting from any damage or injury to them.

The cases cited by appellant are not in point. In *Galveston, H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481 (1912), the consignee did not receive the goods, and the Court stated that "the presumption arose that they had been lost by reason of the negligence of the carrier or its agents." (p. 492.)

In *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465 (1919), the suit was for the loss or damage occasioned by a collision, and the issue was whether the suit was barred by the limitations clause in the bill of lading.

The difference between such loss and damage cases and this case is apparent. Here the plaintiff is making a direct attack upon what is admittedly a long established practice. (Par. 15, R. 10.) If the practice is unjust and unreasonable, there is a violation of the Interstate Commerce Act. The plaintiff seeks an order changing that practice for the future, and granting damages for the past and the determination of damages would require the determination of reasonable rates. A judgment in favor of Armour would create the very discrimination in treatment of shippers that is forbidden by the Act.

In the loss and damage cases, on the other hand, there is no rule, regulation, or practice involved in any way. There is no question and there is no problem of maintaining uniformity among shippers in order to prevent discrimination. The fact that suits for loss, damage or injury to shipments, not involving violations of the Act over which the Commission has jurisdiction, may be brought in the courts, does not support the maintenance of this cause in the courts until there has been preliminary resort to the Commission.

C. The Necessity for Preliminary Resort to the Commission Depends Upon the Substance of the Issues to Be Determined and Not Upon the Form in Which the Cause of Action Is Stated.

Armour argued below and argues indirectly here that this suit arises from an alleged breach of the carriers' common law duties, the contract duties imposed by the Uniform Live Stock Contract, and the duties imposed by the Bills of Lading Act, and that therefore the necessity for preliminary resort to the Commission may be avoided. As shown above, however, the complaint charges the violation of the Interstate Commerce Act, both explicitly and by necessary effect. These alleged violations are of a character which require an exercise of the administrative judgment of the Commission. The necessity for preliminary resort to the Commission is based upon the substance and actuality rather than the form of the complaint.

The decisive answer to the contention that preliminary resort to the Commission is unnecessary because plaintiff relies on the common law is that in many of the principal cases holding that preliminary resort to the Commission was required, including the leading *Abilene* case itself, the complaint was drawn to state a cause of action at common law. In each of the following cases the plaintiff had phrased its complaint as a common law cause of action, yet this Court held that none of them could be maintained without preliminary resort to the Interstate Commerce Commission. *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43 (1916); *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477 (1918); *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482 (1928).

In the leading *Abilene* case, 204 U. S. 426, this Court said:

"Adopting the construction of the pleadings evi-

dently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a *violation of an alleged common law right,* * * *." (pp. 432, 433.)

The plaintiff there, as does Armour here, argued that the right to sue in the courts on a common law cause of action was preserved by the terms of Section 22 of the Act. (49 U. S. C. Sec. 22.) The Court rejected the argument, saying:

"This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words the act cannot be held to destroy itself." (p. 446.)

In a recent case holding that the settled rules requiring preliminary resort under the Interstate Commerce Act apply also under the Shipping Act, the Court commented on Section 22 as follows:

"the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies * * *." *United States Nav. Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, 485, 486 (1932).

In *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43 (1916), the plaintiff complained that the carrier had "failed to perform its common law duty to furnish adequate cars"; nevertheless, preliminary resort to the Commission was required.

In *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477 (1918), the state court had granted damages for an alleged violation of the common law duty to transport shipments by the cheapest route. This Court held that, since the routing of the shipments was in accordance with the estab-

lished practice, "the courts may not be resorted to until the administrative question [of the validity of the practice] has been determined by the Commission." (p. 484.)

In *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482 (1928), suit was brought for damages for failure to furnish enough cars. The defendant had furnished all the cars that the plaintiffs were entitled to under the established practice, just as the treatment of Armour's shipments is in accordance with the long established practice. The plaintiffs' contention was stated by the Court as follows:

> "The plaintiffs contend, and the state court held, that the action lay because it was brought to enforce the common law duty of the carrier to furnish cars [citing one case]—a duty confirmed by the statutes of the State (Crawford & Moses, Arkansas Digest, 1921, Sec. 895), and recognized by the Interstate Commerce Act. They argue that the right to bring an action in the courts of a State for a breach of that duty has been specifically preserved to the shipper by § 22 of the Interstate Commerce Act * * *." (pp. 483, 484.)

It was held that the action could not be maintained without preliminary resort to the Commission, the Court saying:

> "The law exacts only what is reasonable from such carriers. The reasonableness of the rule adopted by the carrier is a matter for the Commission." (p. 485.)

Similarly, the law exacts only what is reasonable from the defendants in connection with the delivery, and the reasonableness of the established rule and practice is a matter for the Commission.

Plaintiff's reliance upon *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128 (1891) is significant. That suit was begun on June 1, 1886, prior to the enactment of the Interstate Commerce Act in February, 1887. Since Section 22 provided "That no pending litigation shall in any way be affected by this Act", there was no question of loss of jurisdiction of the cause in the courts. Neverthe-

less, immediately following the passage of the Act, the plaintiff in that suit recognized that his claim, which Armour asserts to be identical with Armour's claim, was one within the jurisdiction of the newly created Commission. He therefore began proceedings before that body on the same cause of action previously submitted to the courts. The Commission held that it had jurisdiction of the claim, despite the pendency of the court action, and issued its order in *Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. 661 (1887). Thus, the very case upon which Armour relies for its argument that the Commission has no authority to try this case is one which the Commission, in its first year of existence, held to be within its jurisdiction.

If the *Covington* cases were begun today, there is little doubt, we submit, that the Commission's jurisdiction would be held to be exclusive in the first instance. As the Court said: "The petition proceeded upon the ground that unjust and illegal discrimination had been and was being made against Keith * * *." (p. 129.) It has long since been settled that on such a claim, preliminary resort to the Commission is required. (*Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481 (1910); see *Merchants' Elevator* case, pp. 42-44, *supra.*)

Although the question presented to this Court is one of jurisdiction and not of the merits, it may be noted, in view of Armour's stress upon the Court's decision, that both the facts and the holdings in the *Covington* cases are quite different from the facts alleged and relief prayed for in this case. There, the carriers had made the stockyards the exclusive delivering point in the City of Covington and refused to make deliveries at plaintiff's own stockyards or at any other points. Here the carriers offer the shippers, under the tariffs, the choice of consigning for delivery at the Union Stock Yards, the team tracks of the individual railroads at other points in the Chicago district, or the industry tracks of the packers. (See pp. 20-21,

supra.) More than one-third of all direct shipments of livestock arriving in Chicago are unloaded at points other than the stockyards, and the Commission has found the team track facilities of the defendants to be "ample." Furthermore, neither the Commission nor the Court in the *Covington* cases ordered the carrier to provide free egress at the stockyards, which is the relief sought by Swift and Armour. The Court's conclusion was as follows:

> "* * * as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish." (p. 136.)

Likewise, the Commission's order read as follows:

> "Until the defendants provide some other suitable and convenient place at Covington, where the complainants may ship and receive live stock free from other than the customary transportation charges, the defendants should be and will be required to receive from and deliver such live stock to complainants at their own yards." (p. 603.)

A decree or order such as these would be the equivalent of the dismissal of Armour's suit. The carriers offer ample delivery facilities at Chicago, away from the stockyards, where no yardage charges are assessed. It is Armour's option either to consign for delivery at the Union Stock Yards, obtain free unloading, and pay the customary tariff yardage charge of the Stock Yards Company for the services and facilities of that Company beyond the unloading pens, or consign to one of the other points, perform its own unloading, and pay no yardage charges. The *Covington* cases are as conclusive against Armour on the merits as they are on the present question of jurisdiction

Armour's assertion that the carriers have breached the Uniform Live Stock Contract does not affect the rule requiring preliminary resort to the Commission in a case of this character any more than the claim that they have violated their common law duties. That contract, which was prescribed by the Commission itself, (see p. 19, *supra*) provides that "the carrier agrees to carry to its *usual* place of delivery at said destination * * *." (R. 23.) That "usual" place of delivery at this "station", namely, at Union Stock Yards, as admitted in the complaint, is and has been the unloading pens of the Stock Yards Company rather than some point at the boundaries of the Union Stock Yards. (Pars. 3, 4, 15, R. 6, 10.) The complaint therefore shows on its face that the terms of the contract respecting the place of delivery have been complied with.

Furthermore, the contract is expressly made "subject to the classifications and tariffs in effect on the date of issue of this agreement." (R. 23.) The contract does not purport to give Armour any rights additional to the provisions of the Interstate Commerce Act and the applicable tariffs. Any such attempt would, of course, be invalid. *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155 (1912); *Davis* v. *Cornwell*, 264 U. S. 560 (1924); *L. & N. R. R.* v. *Central Iron Co.*, 265 U. S. 59 (1924). The questions to be considered under the statutes, classifications and tariffs are the questions already discussed in this brief—namely, at what point transportation ends, exactly where should delivery be made, and what character of delivery services and facilities may be reasonably demanded of the carriers. These questions require preliminary determination by the Commission. Their answer is not to be found in the terms of the contract itself, nor can it be found by the consideration of pure questions of law. The fact that these issues may be presented in connection with a contract does not give a Court power to make its own decision in the first instance. *Sandusky-Portland Cement Co.* v. *Balt. & Ohio*

R. R., 187 Fed. 583 (C. C. A. 7, 1911); *Goodbody* v. *Pennsylvania R. R.*, 29 F. (2d) 67 (C. C. A. 6, 1928).

Moreover, that this suit does not concern a mere matter of contract rights which the courts would be able to determine in the first instance, is shown by the fact that the complaint seeks an injunction to compel the delivery of future shipments in the manner demanded by Armour. There are no contracts covering such future shipments, and the terms of any contracts which may later be entered into may differ from the present ones, should the Commission prescribe an amendment to the Uniform Contract.

Plaintiff also argues that the need for administrative action here may be avoided because the established delivery practice, it is claimed, constitutes a breach of the Bills of Lading Act, 49 U. S. C., Secs. 89, 90. (Brief, pp. 40-41.) There is no mention of that Act in the complaint, and plaintiff did not mention it in the District Court. It is unnecessary to discuss the fact that it has no application to this case, since it is settled that where the questions raised are of a character which requires the exercise of the administrative judgment of the Commission, the fact that they are presented in a complaint alleging a breach of some statute other than the Interstate Commerce Act does not give the court primary jurisdiction. *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482 (1928); *Keogh* v. *Chicago & N. W. Ry.*, 260 U. S. 156 (1922). In the former case, the suit was brought for an alleged breach of the common law and of a state statute. In the latter, the suit was brought under Section 7 of the Federal Anti-Trust Act. In neither case was a violation of the Commerce Act expressly alleged, yet in both the Court held that the issues presented were within the province of the Commission and not of the courts. In the *Keogh* case the Court remarked that:

> "* * * the amount recovered might, like a rebate, operate to give him a preference over his trade com-

petitors. It is no answer to say that each of these might bring a similar action under § 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440." (p. 163.)

This statement is as pertinent to an alleged cause of action under the Bills of Lading Act as it was to an action under the Anti-Trust Law. The same rule was applied to a suit under the Anti-Trust Act when preliminary resort to the Shipping Board was necessary because of the character of the issues. *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932).

IV.

THE DISMISSAL OF THE COMPLAINT SHOULD BE AFFIRMED BECAUSE OF THE PLAINTIFF'S FAILURE TO JOIN THE UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO, AN INDISPENSABLE PARTY.[1]

Armour's contractual obligations to the Yards Company in respect to the use of the latter's facilities for the delivery of direct shipments are stated by the Commission in its decision in the *Swift* case. (R. 108-110.) It is a matter of common knowledge, moreover, that the individual who owns the Union Stock Yard & Transit Company is also Chairman of the Board of Directors of Armour and Company.[2] It is for these reasons, we assume, that the Yards Company was not named a defendant in this suit.

The Yards Company both owns and operates the prop-

[1] Patrick H. Joyce and Luther M. Walter, as Trustees of the property of Chicago, Great Western R. R. Co., and Holman D. Pettibone, as Trustee of the property of Chicago, Indianapolis & Louisville Ry. Co., for reasons unrelated to the merits, do not join in the argument on this point IV.

[2] A fact shown by the public reports of the Securities and Exchange Commission. (See, also, R. 110.)

erty over which the plaintiff's animals are removed from the unloading pens to the boundaries of the Union Stock Yards. (Complaint, pars. 4 and 19, R. 6 and 13.) The complaint expressly alleges that these shipments of livestock consigned to plaintiff at Union Stock Yards, Illinois, could not be delivered in accordance with the contract of transportation "save by use of the pens, platforms, chutes and other facilities of" the Stock Yards Company, and could not be removed except by the use of the facilities of that Company. (Complaint, par. 19, R. 13.) The yardage charges, which are assessed for the use of those facilities beyond the unloading pens, are assessed by the Yards Company and not by the defendants. (Complaint, Exhibit "D", R. 35.) They are duly filed by the Yards Company with the Secretary of Agriculture. (Complaint, par. 15, R. 11.) There is no allegation that the defendants have ever assessed those charges, or have ever shared in any way in their assessment or collection. The defendants have no control over the assessment of the yardage charges. The well established practice of demanding their payment from the consignee of every animal entering its Stock Yards is that Company's practice, and as stated by the Commission, "For many years the packers, * * * made the practice of which they now complain their own practice." (R. 111.)

The complaint asks the Court to hold that this yardage charge of the Stock Yards Company, on file with the Secretary of Agriculture, is unlawful; and that the Stock Yards Company's long established practice of demanding the payment to it of a yardage charge on all livestock received at its yards is wrongful.[1] It asks the Court to "adjudge

[1] "And the Yards Company has always collected a charge on all animals received in its yards. It may be assumed that shippers, commission men and packers, including the Hygrade Company, have had knowledge of this long existing practice." *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 199 (1935).

and decree" that the plaintiff is entitled to consign its livestock for delivery at the Union Stock Yards and to receive such shipments without paying the Stock Yards Company's published tariff charges, and "free from any lien or claim of the Stock Yards Company." (R. 21, par. 2 of prayer.) It then asks "that a mandatory injunction be entered requiring the Defendants * * * to provide suitable ingress for plaintiff * * * and proper and reasonable egress for removal of its livestock from the unloading pens of the Defendants, or from such other point in said station where delivery may be tendered to Plaintiff, at the Union Stock Yards in Chicago, Illinois, without the payment of any charge or charges therefor, by Plaintiff, to the Stock Yards Company * * *." (R. 21, par. 3 of prayer.) Furthermore, the complaint seeks to recover damages for the past payments of the yardage charges to the Stock Yards Company. (R. 21.)

It is apparent from this statement that the Stock Yards Company is an indispensable party to every part of the relief requested. The position of that Company is sufficiently disclosed in the letter of its president set forth as Exhibit "D" of the complaint (R. 35), quoted in part at page 24, *supra*.

The District Court held that the complaint must be dismissed, not only for lack of preliminary resort to the Commission but also because of the non-joinder of the Stock Yards Company. (R. 54-55.) The Circuit Court of Appeals found it unnecessary to pass upon this point because of its affirmance of the District Court's decision that this case could not be maintained without prior resort to the Commission. (R. 86.)

The fact that the Stock Yards Company is an indispensable party would of itself require affirmance of the decisions of the courts below. Any injunction issued in this case could only be directed against the present de-

fendants, but the Stock Yards Company is the sole owner and operator of the facilities and property the use of which, as the complaint declares, is necessary for the delivery of plaintiff's animals to the Chicago Union Stock Yards, in accordance with the transportation contract. The use of the property and facilities of the Company is also necessary to the removal of the animals to the boundaries of the Union Stock Yards. If that Company should refuse to allow the "suitable ingress" or the "proper and reasonable egress" over its property which the court is asked to order, it would be utterly impossible for the defendants to obey such an injunction. Similarly, if the Company should continue to insist that its services and facilities beyond its unloading pens remain "stockyard services" and have not suddenly become "transportation services" upon the demand of the packers, it would continue to post the yardage charges in its tariffs with the Secretary of Agriculture and collect them from the consignees. Neither the line-haul carriers nor the court, by any judgment in this case, could control such action by the Stock Yards Company. Or if the Company should refuse to permit this use of its property except upon the payment of an exorbitant sum by the railroads, they, and the court itself, would be helpless in the absence of the Yards Company as a party. Any order running solely against the defendants for a failure to obey the court's order could only harm them without in any way making it possible for them to comply with the order. The Yards Company alone can modify or permit the modification of the charges and practices complained of in this action.

Significantly, at the time of making its demands for ingress and egress over that Company's property without payment of the yardage charges, the plaintiff addressed its demands to the Yards Company as well as to the defendants. (Complaint, Exhibits "C" and "F", R. [illegible],

37.) The plaintiff realized that the Yards Company must of necessity be a party to any change in the established practice.

In both previous cases considered by this Court involving attacks by shippers upon charges of the Stock Yards Company in addition to the line-haul rate, the Company was a party defendant. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193 (1935) (the *Hygrade* case); *Adams* v. *Mills,* 286 U. S. 374 (1932). In the latter case, the charge collected by the Yards Company was for unloading, but the principle is identical. In both cases the Yards Company was a party defendant and the action was begun before the Commission. The indispensability of that Company as a party to this suit is accentuated by the fact that here, unlike the situation in *Adams* v. *Mills,* there is no allegation that the line-haul carriers participated in the practice complained of, either by collecting the yardage charges, by sharing in those charges or by assisting the Yards Company in its assessment and retention of those charges.

The defect in jurisdiction arising from the failure to join the Yards Company is not restricted to the part of the prayer respecting relief for the future. The fundamental proposition upon which the entire prayer depends is stated in the first paragraph, in which plaintiff seeks an adjudication and decree that the Yards Company has no "lien or claim." (R. 21.) The complaint discloses that the Company asserts that it does have such a lien or claim against Armour for yardage charges, in accordance with its tariffs on file with the Secretary of Agriculture. Obviously, no court could make the ruling requested by plaintiff in a case in which the Company asserting the disputed claim was not a party. Yet that proposition is fundamental to every part of the relief sought. In the

absence of the Yards Company, the ruling that the complaint must be dismissed should be affirmed.

As early as 1827 this Court applied the fundamental rule of law involved here. In *Mallow* v. *Hinde*, 12 Wheat. 193, 196, 198, the Court stated that:

> "For the appellees, it is insisted, that the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims. And we are all of that opinion.
>
> * * * * * * *
>
> "The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant, without directly affecting and prejudicing the rights of others, not made parties."

Among the many cases stating and giving effect to this well-settled rule are:

Shields v. *Barrow*, 17 How. 129, 139-141 (1854);
Gregory v. *Stetson*, 133 U. S. 579, 586 (1890);
New Orleans Water Works Co. v. *New Orleans*, 164 U. S. 471, 480 (1896);
Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 235 (1902).

The Yards Company is an indispensable party because it has

> "* * * such an interest in the matter in controversy that it could not be determined without either affecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity."
>
> *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152, 159 (1924).

In a recent opinion by the Circuit Court of Appeals for the Ninth Circuit, the authorities upon whether an absent party is, in the language of the cases, an "indispensable" one or is merely "necessary" are collected and discussed at length. *State of Washington* v. *United States*, 87 F.

(2d) 421 (1936). Under the tests there summarized, the Yards Company is indispensable because the Court could not render justice between the parties before it in the absence of that Company, and a decree that the Company does not have the lien or claim which it asserts would have an injurious effect on the interest of the Company. Finally, the court's determination, in the absence of the Stock Yards Company, that the Company's established yardage charges are unlawful and that the plaintiff is entitled to receive its shipments at the Union Stock Yards and use the facilities of the Yards Company without paying its charges are certainly inconsistent with equity and good conscience. It is equally inconsistent with equity that the defendant line-haul carriers should be ordered to provide suitable ingress and proper and reasonable egress for the plaintiff's animals at the Union Stock Yards when, as the complaint asserts, the defendant carriers do not own or control the facilities at the Union Stock Yards and have no control over the Stock Yards Company which is the sole owner and operator of those yards. (R. 6, 7, 13.)

In the absence of the Yards Company, the alleged invalidity of the tariff yardage charges of that Company cannot be adjudicated and the mandatory injunction requested would be futile. In its petition for a writ of certiorari Armour did not question the decision below that the Company is an indispensable party. There is no conflict among the circuits concerning that decision and no other reason why this Court should review it, even if it had been presented as a ground for certiorari.

It is submitted that the failure to join the Yards Company as defendant requires the dismissal of the complaint.

V.

THE COMPLAINT AGAINST THE TRUSTEES AND RECEIVERS SHOULD BE DISMISSED BECAUSE OF PLAINTIFF'S FAILURE TO OBTAIN CONSENT TO BRING THIS SUIT.

Many of the carriers involved are in bankruptcy or receivership and among the defendants are trustees appointed in Section 77 and certain receivers. In the absence of a permissive statute, no trustee or receiver may be sued without the consent of the court which appointed him. *Barton* v. *Barbour*, 104 U. S. 126 (1881). The authorities are listed and discussed at length in *Merryweather* v. *United States*, 12 F. (2d) 407 (C. C. A. 9th 1926).

Section 66 of the Judicial Code of the United States (28 U. S. C., Sec. 125), which is quoted at page 36 of Armour's brief, does not change that rule of law here, since this suit does not involve "any act or transaction of" the trustees and receivers, but, on the contrary, involves the conduct of the business and the management of the property in their hands. With respect to such a suit, that section is inapplicable.

In *Ex Parte Baldwin*, 291 U. S. 610 (1934), it was alleged that the debtor railroad company had broken an agreement with the plaintiff requiring it to maintain train service. The plaintiff sued the trustees, asking that the railroad forfeit its right of way and pay damages of $150,000. With reference to Section 66 of the Judicial Code, the Court, through Mr. Justice Brandeis, stated:

> "That section does not abridge the exclusive jurisdiction of the court over property of which it has taken possession. *In re Tyler*, 149 U. S. 164, 182-4.
>
> "It is true that the Investment Company seeks, in addition to the adjudication of the forfeiture of the right of way, damages 'in the sum of $150,000' from the two railways and 'from the trustees in their said

> capacity as trustees' for failure to maintain the daily schedule of passenger trains set forth in the contract. This prayer of the complaint is no bar to staying the suit in the state court. The exclusive jurisdiction of the bankruptcy court is determined by the main purpose of the suit, which is to have the forfeiture declared and the alleged cloud upon title removed. The claim for damages is merely an incident. Moreover, the breach of contract for which damages are claimed is not 'an act or transaction of the "trustees" in carrying on the business connected with such property.'" (P. 61[illegible])

In a footnote to it[illegible]nion (Note 10 on p. 618 of 291 U. S.) the Court cites numerous decisions to the effect that where Section 66 of the Judicial Code permits suit against a receiver without leave of the court which appointed him "in respect of any act or transaction of his in carrying on the purposes connected with such property," it means only suits brought for the purpose of imposing some liability on the receiver in respect to his acts, and not matters relating to the possession, control, and management of the property by the receiver, or the conduct of the business.

In the *Interborough Rapid Transit* case (*American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 10 Fed. Supp. 512 (D. C. S. D. N. Y. 1935), affirmed 76 Fed. (2) 1002, cert. den. 295 U. S. 760), it was held that a suit for a declaratory judgment that the receiver's proposed disaffirmance of a certain lease would result in the breach of an obligation to the City of New York could not be maintained without the prior consent of the receivership court. With reference to Section 66 of the Judicial Code, Judge Mack said:

> "* * * As uniformly interpreted by the courts, its sole purpose is to make federal receivers amenable to state court suits on causes of action arising out of the ordinary operation of the company in receivership. Actions for personal injuries caused by the negligent operation of a common carrier are a familiar example.

Gableman v. *Peoria, Decatur & Evansville R. R. Co.*, 179 U. S. 335, 21 S. Ct. 171, 45 L. Ed. 220 (1900). On the other hand, causes directly affecting the administration of the receivership res, or property rights therein, do not fall within the provision; to allow such suits to be instituted without leave of the court which has the property in its custody would divest it of its exclusive jurisdiction thereover and lead but to conflict and confusion in administration. Such was not the legislative purpose.

"The city admits that section 66 does not embrace suits intended to establish liens or possessory or ownership rights in the receivership res. [Citing cases.] These cases are sought to be distinguished, however, on the ground that the suit herein proposed involves the management of the company rather than property rights in its assets. Such a distinction ignores the ratio decidendi of the cases cited. An adjudication by another court on questions of the proper management of property in the custody of this court, unless with the consent of this court, would be as much an interference with the administration of that property as a decision on questions of title and possession of the res." (P. 518.)

Plaintiff admits that this suit would result in an interference with the operation and control of the property *in custodia legis*, but urges that: "Such interference as Armour seeks to enforce upon these trustees is the interference of the law itself." (Brief, p. 39.) That argument is beside the point, since the interference in any such case would only occur after the decision of the suit, *i. e.*, after the court had decided that the plaintiff had a rightful claim under the law.

The cases relied upon by the plaintiff do not sustain its position. (Brief, p. 37.) The first two cases cited dealt merely with personal injury suits. In two of the remaining three cases, the court held that Section 66 did not apply to the character of suit involved.

Ex Parte Tyler, 149 U. S. 164 (1893).

(Action by State for collection of taxes against railroad in receivership.)

Central Trust Co. of N. Y. v. *Wheeling & L. E. R. Co.*, 189 Fed. 82 (C. C. N. D. Ohio 1911). (Attempt to garnish funds held by receiver.)

The remaining case relied upon by the plaintiff concerned the form of a proposed order by the receivership court enjoining suits against the receiver, with certain exceptions. *Central Trust Co.* v. *St. Louis, A. & T. Ry. Co.*, 41 Fed. 551 (C. C. E. D Ark. 1890).

The cases concerning personal injuries are very different from the present one. Here the plaintiff is attempting to compel the trustees and receivers to provide for the operation of additional terminal facilities and to extend the scope of the transportation services to be performed by them, as well as asking damages as a result of their having followed the established practice with respect to deliveries at the Union Stock Yards. Such a suit directly interferes with the management and conduct of the estates, and therefore, under the authorities cited above, should be dismissed for want of prior consent by the appointing courts, as the District Court held.

Respectfully submitted,

KENNETH F. BURGESS,
FRANK H. TOWNER,
MEYER MORTON,
ELMER W. FREYTAG,
DOUGLAS F. SMITH,
D. ROBERT THOMAS, JR.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

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APPENDIX.

INTERSTATE COMMERCE COMMISSION
Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Complaint filed September 20, 1937;

Pages 4 and 5 of the transcript of the stenographer's notes of the hearing held May 31, 1938, at Chicago, Ill., before Examiner Paul O. Carter; and

Petition for Intervention filed at said hearing,

in Docket No. 27862, *Swift and Company et al.* v. *The Alton Railroad Company, et al.*, the originals of which are now on file and of record in the office of this Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 13th day of September, A. D. 1938.

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

(SEAL)

FILED SEPT. 20, 1937.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

SWIFT AND COMPANY, et al.,
vs.
THE ALTON RAILROAD COMPANY, et al.,
} Docket No. 27862.

COMPLAINT.

ROSS DEAN RYNDER,
Attorney for Complainants.

Chicago, September 18, 1937.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

SWIFT AND COMPANY
OMAHA PACKING COMPANY and
G. H. HAMMOND COMPANY

v.

THE ALTON RAILROAD COMPANY
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
THE BALTIMORE AND OHIO RAILROAD COMPANY
THE CHESAPEAKE AND OHIO RAILWAY COMPANY
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY
(Charles M. Thomson, Trustee)
CHICAGO AND NORTH WESTERN RAILWAY COMPANY
(Charles P. Megan, Trustee)
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
CHICAGO GREAT WESTERN RAILROAD COMPANY
(Patrick H. Joyce and Luther M. Walter, Trustees)
CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
(H. R. Kurrie and Holman D. Pettibone, Trustees)
CHICAGO JUNCTION RAILWAY
(The Chicago River and Indiana Railroad Company, Lessee)
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
(Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees)
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY
(Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees)
The CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY
(The New York Central Railroad Company, Lessee)
ERIE RAILROAD COMPANY
GRAND TRUNK RAILWAY SYSTEM
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers)
comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company
(Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company
(Canadian National Railway Company, Lessee)
GRAND TRUNK RAILWAY SYSTEM
(Lines west of Detroit and St. Clair Rivers)
comprising the following carriers:
Grand Trunk Western Railroad Company
Cincinnati, Saginaw and Mackinaw Rail Road Company
(Grand Trunk Western Railroad Company, Lessee)
ILLINOIS CENTRAL RAILROAD COMPANY
THE MICHIGAN CENTRAL RAILROAD COMPANY
(The New York Central Railroad Company, Lessee)
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY
THE NEW YORK CENTRAL RAILROAD COMPANY
THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY
THE PENNSYLVANIA RAILROAD COMPANY
PERE MARQUETTE RAILWAY COMPANY
WABASH RAILWAY COMPANY and
(Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers).

COMPLAINT.

The complaint of the above named complainants respectfully shows:

I.

That complainant, Swift and Company, is a corporation organized and existing under the laws of the state of Illinois, with principal office and place of business at Chicago, Ill.; that complainant, Omaha Packing Company, is a corporation organized and existing under the laws of the state of Kentucky, with principal office and place of business at Chicago, Ill.; that complainant, G. H. Hammond Company, is a corporation organized and existing under the laws of the state of Michigan, with principal office and place of business at Chicago, Ill. That Omaha Packing Company and G. H. Hammond Company are wholly owned subsidiaries of Swift and Company. That complainants are engaged in what is commonly known as the packing house business and that they operate packing plants for the processing of live stock in the city of Chicago, Ill., adjacent to the stock yards of The Union Stock Yard and Transit Company of Chicago.

II.

That the defendants above named are common carriers engaged in the transportation of property, wholly by railroad, between points in the State of Illinois and points in the states of Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Colorado, Kansas, Missouri, Oklahoma, Texas, Indiana, Ohio, and various other states in the United States, as their routes may run, and in connection with other carriers with whom said defendants participate in the through transportation of live stock, in carloads, from various points of origin throughout the

United States to Chicago, Ill.; and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III.

That in the transaction of their businesses during recent years complainants have shipped via the lines of railroad of the defendants herein, from various points of origin as above described, consigned to complainants at Union Stock Yards, Chicago, Ill., what are commonly known as "direct shipments" of live stock. By direct shipments of live stock are meant shipments as to which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries, agents, or employees is shown as the consignor in the bill of lading, shipping receipt, waybill, or other transportation documents issued by the defendants at the several points of origin, and in which Swift and Company, Omaha Packing Company, or G. H. Hammond Company, or one of their subsidiaries, agents, or employees is shown as the consignee of the shipments at Union Stock Yards, Chicago, Ill.; which are not purchased on the property of The Union Stock Yard and Transit Company of Chicago; and as to which no use by complainants is required or desired of services, facilities, or property of The Union Stock Yard and Transit Company of Chicago, except such as may be incident to the delivery of such shipments to the agents or employees of the complainants at said destination. Such direct shipments of live stock are generally shipments which have been purchased by one of complainants or one of its buyers at some point other than Chicago and have been consigned thence to one of complainants at Union Stock Yards, Chicago, Ill., over the lines of one or more of the defendants. Hereinafter the term "direct shipments" without further definition shall be understood to mean shipments of live stock as defined in this paragraph.

IV.

By proper tariff publication, and by long usage and custom, defendants have constituted the Union Stock Yards in Chicago, Ill., as their terminal for the receipt and delivery of live stock in Chicago, Ill. When direct shipments from points of origin as above described, consigned to one of complainants at Union Stock Yards, Chicago, Ill., have reached their terminus, the cars containing such live stock are, by defendants, placed along certain unloading or chute pens of The Union Stock Yard and Transit Company of Chicago, said chute pens being upon the property of and owned by The Union Stock Yard and Transit Company of Chicago. That such direct shipments are then unloaded from said cars into said unloading or chute pens of The Union Stock Yard and Transit Company of Chicago, by employees of The Union Stock Yard and Transit Company of Chicago, for compensation paid by defendants herein to The Union Stock Yard and Transit Company of Chicago.

V.

In the ordinary course of business, after a direct shipment is unloaded from the car in which it has been transported, into one of the unloading pens of The Union Stock Yard and Transit Company of Chicago, such direct shipment is immediately taken by employees of the defendants' agent, The Union Stock Yard and Transit Company of Chicago, over the protest of complainants, as hereinafter set forth, to so-called holding pens, from which such direct shipment is permitted to be taken by complainants, their agents, or employees, out of the custody of defendants' agent, The Union Stock Yard and Transit Company of Chicago.

VI.

That said agent of defendants, The Union Stock Yard and Transit Company of Chicago, publishes and files with the Secretary of Agriculture (but not with the Commission) a schedule of charges (Amendment No. 3 to U. S. Y. & T. Co. No. 10) in which are named certain yardage charges which are as follows:

Cattle	45 cents per head
Calves (400 lbs. or under)	35 cents per head
Hogs	15 cents per head
Sheep and/or goats	10 cents per head

That the charges per head recited in this section are denominated "yardage charges" and purport to cover services rendered after transportation by defendants, under their line-haul rates, has been completed. That in fact, as applied to complainants' direct shipments, transportation under defendants' line-haul rates is not completed until said direct shipments are delivered to one of complainants and placed in its custody, or until defendants have notified said complainant of the arrival of said direct shipments and afforded such complainant a reasonable time within which to take possession thereof and remove them from the custody of defendants or their said agent. That said yardage charges are improperly and unlawfully exacted from complainants in connection with the transportation service of said direct shipments as defined in section 1 (3) of the Interstate Commerce Act, before a lawful delivery of said direct shipments has been accorded to complainants by defendants, and before complainants have been afforded an opportunity to obtain possession of said shipments.

VII.

That complainants are unable to obtain delivery of their direct shipments from defendants, even by mere egress from said unloading pens to the nearest public street, and

even though their own employees are at said unloading pens ready and willing to accept delivery of said direct shipments of live stock and to remove them by the shortest egress to a public street, without payment of the yardage charges recited in section VI hereof, in addition to the payment of the line-haul freight rates upon said direct shipments duly published and filed with the Commission and applicable to such direct shipments from said points of origin to the terminals of defendants for delivery of live stock at Union Stock Yards, Chicago, Ill.

VIII.

That on or about May 9, 1933, complainant Swift and Company addressed a letter to each of the principal traffic officers of the defendants herein, in which said complainant stated, on behalf of itself and its said subsidiaries, that it was ready, willing, and prepared to accept direct shipments at the reasonable and proper delivery pens of each of said defendants at Union Stock Yards, Chicago, Ill., and within a reasonable time to remove said direct shipments to its own plant without other use of the facilities of The Union Stock Yard and Transit Company of Chicago than an egress to the nearest public street; that on and after May 25, 1933, said complainant would refuse to pay to the defendants or to their agent, The Union Stock Yard and Transit Company of Chicago, any yardage charge upon direct shipments so delivered by the defendants and so accepted and removed by Swift and Company; that Swift and Company at the same time sent a copy of said letter of May 9, 1933 to the agent of the defendants, The Union Stock Yard and Transit Company of Chicago; that on or about May 10, 1933, the President of The Union Stock Yard and Transit Company of Chicago addressed a letter to the Traffic Manager of complainant Swift and Company, in which said President stated that said complainants would

not be permitted to take possession of direct shipments at the unloading pens of The Union Stock Yard and Transit Company of Chicago without payment of the yardage charges of said company for the use of its facilities; and that, unless and until said threat of not paying said yardage charges of The Union Stock Yard and Transit Company of Chicago was withdrawn, or until and unless such charges were paid, that company would not permit live stock consigned to complainants at said Union Stock Yards to be delivered to complainants or their employees on and after May 25, 1933; that thereafter, on or about May 16, 1933, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed a letter to the chief traffic officer of each of the defendants herein, in which attention was called to said letter of May 10, 1933, signed by the President of The Union Stock Yard and Transit Company of Chicago, advising said defendants that on and after May 25, 1933, The Union Stock Yard and Transit Company of Chicago had no authority to accept or receive live stock for complainants as their agent, for their account, or in their name; that after May 25, 1933, any delivery by any of defendants of complainants' direct shipments of live stock to The Union Stock Yard and Transit Company of Chicago, except as defendants' agent for unloading and delivery, would constitute a conversion of complainants' property; and that any payment by complainants of yardage charges to The Union Stock Yard and Transit Company of Chicago, made to gain possession of said direct shipments after said date, would be under protest, would be for the account of said defendants, and would be made purely in mitigation of damages; that on or about May 24, 1933, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed a letter to the President of defendants' agent, The Union Stock Yard and Transit Company of Chicago, calling attention to the fact

that said agent had refused to relinquish possession of complainants' direct shipments without payment of said yardage charges; that on or about May 24, 1933, the President of defendants' agent, The Union Stock Yard and Transit Company of Chicago, advised complainants by letter that said Transit Company was willing to accept, from time to time, payment by complainants of said yardage charges after May 25, 1933, with the understanding that such payments would be made by complainants under protest and in mitigation of damages; and that it might also be understood, with respect to each and every of said direct shipments thereafter made to complainants, that a physical demand for delivery and for the right to promptly remove such stock from the premises of said Transit Company, without payment of such yardage charges, was to be considered as having been made by complainants as soon as said direct shipments were unloaded, and that said demand was refused by The Union Stock Yard and Transit Company of Chicago immediately after unloading; and that such demand would actually have been made but for the advice of The Union Stock Yard and Transit Company of Chicago that the same would be continually refused; that on May 19, 1933, each of the defendants addressed a letter to complainants refusing the demands made upon said defendants in complainant's said letter of May 9, 1933.

That on or about September 9, 1935, complainant Swift and Company, on behalf of itself and its said subsidiaries, addressed another letter to each of the principal traffic officers of the defendants herein, again demanding that complainants be permitted to obtain possession of their direct shipments of live stock consigned to the Union Stock Yards, Chicago, Ill., without payment of the yardage charges of The Union Stock Yard and Transit Company of Chicago, and that complainants be permitted imme-

diately to remove such live stock from the unloading pens to a public street by a proper and convenient means of egress to such street, to be designated by defendants, without other use of the property of The Union Stock Yard and Transit Company of Chicago; that on or about September 20, 1935, each of said defendants addressed a letter to complainant Swift and Company, refusing said demand of complainants.

IX.

That since May 25, 1933, in each instance where complainants have been compelled to pay yardage charges on direct shipments to defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to obtain possession thereof, such payment by each complainant has been made by its check or voucher in favor of The Union Stock Yard and Transit Company of Chicago, upon which there has been stamped by said complainant a notice that said payment is made under protest and in accordance with the terms of the letters above described. That, in addition thereto, after payment under protest of said yardage charges to The Union Stock Yard and Transit Company of Chicago, complainants have, at stated intervals, rendered to each of the defendants, respectively, bills against each of said defendants covering the amount of said yardage charges paid under protest to The Union Stock Yard and Transit Company of Chicago upon so many of the shipments as had arrived during such period via the line of the defendant against whom such bill was made; that all of said demands of complainants for delivery of their direct shipments without assessment of said yardage charges and the payment of each of said bills against said defendants have been refused by the defendants.

X.

That the demands herein recited made upon defendants by complainants have not sought the use by complainants of any of the pens, alleys, runways, overhead drives, or tunnels of defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to drive live stock to the packing plant of the complainants; but have sought only the lawful right of complainants to be permitted to take possession of their direct shipments of live stock at the unloading pens of the defendants herein at the Union Stock Yards, Chicago, Ill., and thence to remove said direct shipments of live stock to a public street by the shortest and most convenient means of egress, such route of egress to be determined by defendants.

XI.

That the course of conduct of the defendants above described, in so delivering direct shipments of live stock to complainants at Union Stock Yards, Chicago, Ill., as to require complainants to pay yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago, in order to obtain possession of complainants' live stock; the repeated refusal of said defendants to deliver direct shipments to complainants at defendants' live stock terminals at the Union Stock Yards in Chicago, upon payment to defendants of all lawful transportation charges published by the line-haul defendants; and the refusal by defendants of complainants' reasonable and lawful demands for egress from defendants' unloading pens to the nearest public street without payment of yardage charges to The Union Stock Yard and Transit Company of Chicago, constitute an unreasonable rule, regulation, or practice in connection with the transportation and delivery of complainants' said direct shipments, in that complainants are

entitled to reasonably convenient and safe chutes, pens, and ways for discharging live stock from the line-haul defendants' cars and taking live stock from defendants' premises without the imposition of a yardage charge, and because transportation of such direct shipments under defendants' line-haul rates has not ended until complainants have been afforded an opportunity to remove their direct shipments of live stock from the unloading pens of the defendants at Union Stock Yards, Chicago.

XII.

That by reason of the facts stated in the foregoing paragraphs, complainants have been subjected to the payment of rates and charges for the transportation of their direct shipments of live stock, consigned to them at Union Stock Yards, Chicago, Ill., via the lines of the defendants herein, and to the application of rules, regulations, and practices which were and still are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act; that complainants have been injured thereby to their damage in the sum of $17,500.00 in connection with said direct shipments during a period of two years immediately prior to the filing of this complaint, and will continue to suffer such damage during the pendency of this proceeding.

WHEREFORE complainants pray that the defendants may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said act, and to establish and put in force and apply in future to the transportation of direct shipments of live stock from points of origin, as aforesaid, consigned to complainants, or any of them, at Union Stock Yards, Chicago, Ill., rules, regulations, or practices under which complainants may obtain delivery to them by defendants of said direct shipments at reasonably convenient, safe, and suitable chutes, pens, and ways,

and be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago, and without payment of any charges other than the lawful transportation charges of the defendants for the transportation of such direct shipments from the origin thereof to the Union Stock Yards in Chicago, as provided in the tariffs of the defendants filed with the Commission; or such other reasonable rules, regulations, or practices of similar purport as the Commission may deem proper; and also to pay to complainants by way of reparation for the unlawful charges hereinbefore alleged the total sum of $17,500.00, plus such further amounts as may accrue due to similar violations of complainants' rights by defendants during the pendency of this proceeding, with interest from the date on which each of said yardage charges was paid under protest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Ill., this 18th day of September, 1937.

SWIFT AND COMPANY,
Union Stock Yards,
Chicago, Illinois,

OMAHA PACKING COMPANY,
2320 South Halsted Street,
Chicago, Illinois,

G. H. HAMMOND COMPANY,
Union Stock Yards,
Chicago, Illinois,

By ROSS DEAN RYNDER,
Their Attorney.

VERIFICATION.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

J. H. BLISS, being duly sworn, deposes and says that he is Assistant Treasurer of Swift and Company, one of the complainants in the above entitled proceeding; that he has read the foregoing complaint, and knows the contents thereof; that the same are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

J. H. BLISS.

SUBSCRIBED in my presence, and sworn to before me, by the affiant above named, this 18th day of September, 1937.

ROBYN WILCOX,
(SEAL) *Notary Public.*

Commission expires February 1, 1939.

PROCEEDINGS.

Exam. Carter: Come to order, please, gentlemen. The Interstate Commerce Commission has set for hearing at this time and place, Docket No. 27862, Swift and Company, *et al.*, *versus* The Alton Railroad Company, *et al.* Who appears for complainants?

Mr. Rynder: R. D. Rynder, U. S. Yards, Chicago, Illinois, appearing for complainants.

Exam. Carter: Are there any interveners?

(No response.)

Exam. Carter: Are there any interveners?

Mr. Blanchard: I beg your pardon. Paul E. Blanchard, Armour Building, U. S. Yards, Chicago, Illinois. I wish to file a petition of intervention on behalf of Armour & Company, and perhaps a word of explanation should be

in order. This petition does not broaden the issues. In fact, it does not even ask affirmative relief from the hands of the Commission, the reason being that we have already invoked the jurisdiction of the courts on the same facts, and same subject matter by filing our suit as set forth in the petition, asking not only adjunctive relief against what we regard as the continuous breach of the contracts of transportation, but we have asked for damages for the past because of the breaches of such contracts by the defendant carriers. I think I should explain, in justice to the Commission, why I feel it advisable to go to the courts, instead of the Commission. As this record will show, this question has been the subject of repeated correspondence and conferences. It has been a matter that has been most controversial for five years—

Mr. Smith: The defendants object to the intervener making any statement as to why he is not seeking relief here, but seeking relief in the courts, as immaterial.

Exam. Carter: I will sustain that objection.

Mr. Blanchard: Very well.

Exam. Carter: Have you examined the petition of intervention?

Mr. Rynder: I do not have one.

Mr. Blanchard: Let the record show that counsel for Armour & Company offers to explain to the Commission that its failure to ask for relief from the Commission was not due to any lack of confidence in the Commission, or lack of confidence in its justness in handling matters of this sort, but merely was because the complainant felt this case would have to go to court anyhow, because the carriers would not obey any order of the Commission until they had tested it in court.

Exam. Carter: The Commission will assume your motives were of the highest.

Mr. Blanchard: Thank you very much.

Exam. Carter: Have you any objection to this petition?

FILED AT HEARING 5/31/38.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Swift and Company, *et al.*
vs.
The Alton Railroad Company, *et al.*

I. C. C. Docket No. 27862.

PETITION FOR INTERVENTION.

Comes now your Petitioner, Armour and Company, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding, and desires to intervene in, and become a party to, said proceeding, and for grounds of the proposed intervention says:

I.

That Petitioner is an Illinois corporation, with principal offices at Chicago. That it is engaged in the meat packing business and operates a packing plant adjacent to the plant of Plaintiff, and adjacent to the premises of the Union Stock Yards and Transit Company described in the Complaint.

II.

That for many years Petitioner has received as consignee at Union Stock Yards, Illinois, direct shipments of live stock (as defined in the Complaint) which receipts moved to Union Stock Yards from points outside the State of Illinois, via the lines of one or more of Defendants herein, as to none of which any service was required or desired at Union Stock Yards save the service of tender of delivery and delivery by Defendants, ingress for an agent or employee of Petitioner, to the point of such

tender, and delivery for the purpose of the acceptance thereof, and egress from such point for such agent or employee with such delivered live stock.

III.

Petitioner concurs in and adopts the statements made in Paragraphs IV, V, VI, VII, VIII, IX and X of the Complaint. But in so far as said Paragraphs are limited, in their application to the business and actions of complainant, Petitioner alleges that said statements are equally true, and equally applicable to and descriptive of the business and actions of Petitioner.

IV.

Petitioner agrees with but does not concur in, the allegations of Paragraph XI of the Complaint. Petitioner further alleges, that as to each and every such direct shipment of live stock, consigned to it at said Union Stock Yards, on and after May 25, 1933, one or more of said Defendants entered into a written contract severally, or with other common carriers, for the transportation thereof; and that in failing and refusing to deliver said shipments, on and after May 25, 1933, each Defendant, as to each such contract, deliberately and wilfully breached, and failed to perform the same, in that each Defendant refused to complete its engagements made in each such written contract, although each such contract was fully performed by Petitioner. That by reason of such breach, Petitioner was damaged, and each such breach therefore gave rise to an action in a court of law.

V.

That prior to the date hereof, Petitioner invoked the aid of a court of law, and duly filed in the Circuit Court of Cook County its complaint in equity, asking that each of the Defendants therein (or most of them) be enjoined from the repeated, deliberate and intentional violations of its written contracts, and that damages be awarded Petitioner for the previous breaches of all of said contracts by the Defendant delivering each direct shipment thereunder.

VI.

That as a result of said action by Petitioner it is not necessary to complain here of the fact that, as to Petitioner's shipments, such repeated breaches do constitute an unreasonable practice as alleged in the complaint herein. But although Petitioner seeks no remedy here, Petitioner is interested in the facts developed herein, and has the interest in the subject matter hereinbefore set forth.

WHEREFORE, said Armour and Company prays leave to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person, or by counsel upon brief and at the oral argument, if oral argument be had.

Dated at Chicago, Illinois, May 31, 1938.

ARMOUR AND COMPANY,

Petitioner.

By W. S. CLITHERO,

Vice-President.

PAUL E. BLANCHARD,
Paul E. Blanchard, U. S. Yards,
Chicago, Illinois,

Attorney for Petitioner.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

W. S. CLITHERO, being duly sworn, deposes and says: that he is the Vice-President of Armour and Company, Petitioner in the above entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same are true as stated.

W. S. CLITHERO.

Subscribed in my presence, and sworn to before me, by the affiant above named, this 31st day of May, 1938.

J. A. DORIN,
(NOTARIAL SEAL) *Notary Public for Cook County, Illinois.*

My Commission expires Mar. 11, 1939.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss:

I, HOYT KING, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original CERTIFIED COPIES from Interstate Commerce Commission, towit:

Complaint filed September 20, 1937;

Pages 4 and 5 of the transcript of the stenographer's notes of the hearing held May 31, 1938, at Chicago, Ill., before Examiner Paul O. Carter; and

Petition for Intervention filed at said hearing, in Docket No. 27862, Swift and Company, *et al. vs.* The Alton Railroad Company, *et al.*,

filed in this Court on the 15th day of October, A. D. 1938, in cause entitled *Armour & Co.* v. *The Alton Railroad Company, et al.*, Equity No. 16171, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 17th day of December, A. D. 1940.

HOYT KING,
Clerk.

(SEAL)

By EDWARD E. DOUGLAS,
Deputy Clerk.

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SUPREME COURT OF THE UNITED STATES.

No. 293.—October Term, 1940.

Armour and Company, a corporation, Petitioner, *vs.* The Alton Railroad Company, a corporation, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 3, 1941.]

Mr. Justice Black delivered the opinion of the Court.

This litigation is the latest episode of a long struggle involving the meat packers, the railroads, and the Union Stock Yard and Transit Company of Chicago.[1] Basically, on the merits the issue here presented is whether Armour and Company, one of the packers, is correct in its contention that under the facts of this case the railroads must deliver its shipments of livestock at such a location and in such a manner that it need pay no "yardage charge" to the Stock Yards Company. The case is here on certiorari (311 U. S. —) from the Court of Appeals for the Seventh Circuit,[2] which affirmed a District Court order dismissing Armour's complaint against the railroads.[3] The ground on which the Circuit Court affirmed was that the issues involved presented administrative problems, necessitating primary resort to the Interstate Commerce Commission.[4] The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion.

It is petitioner's contention that its complaint showed a wilful failure and refusal on the part of the railroads to deliver livestock

1 See Adams *v.* Mills, 286 U. S. 397; Atchison, T. & S. F. Ry. *v.* United States, 295 U. S. 193.

2 111 F. (2d) 913.

3 27 F. Supp. 625.

4 The District Court, in addition to relying on this ground, held that the complaint should be dismissed for failure to join the Stock Yards Company as a defendant, and for failure to obtain consent of court to bring suit against railroads which were in receivership. We express no opinion on the correctness of those holdings.

to petitioner in accordance with the railroads' contractual and common law duties; that instead of delivering to petitioner, the railroads delivered to the Stock Yards Company—contrary to petitioner's express direction—with full knowledge that the Stock Yards Company would not effect a delivery to petitioner without first exacting a yardage charge in addition to the agreed transportation charges set out in the railroads' regular published tariffs; and that petitioner's right to proceed in the courts for such a breach of duty exists under the provisions of 49 U. S. C., Sections 9 and 22.[5] But respondents contend, and both courts below held, that the issues tendered by the complaint are not so simple as petitioner would have them seem. Their view is that adjudication of the issues presented relates to such complex transportation problems that determination of the legal questions must necessarily be preceded by the consideration of extensive evidence in a specialized field, and that decision of such questions is by statute vested exclusively in the Interstate Commerce Commission.[6] Since the cause was dismissed without answer or evidence, it is on the basis of the allegations of the complaint that we must apply the controlling law.

The factual situation, according to the complaint, is as follows: For many years prior to 1933 the railroads held themselves out as ready to transport goods to "Union Stock Yards, Illinois", and petitioner shipped to itself at that station much livestock from various points of origin in the United States. None of the railroads own or operate a depot or terminal facilities for the unloading and delivery of livestock, but all of them jointly have long had arrangements with the "Union Stock Yard and Transit Company", a public stock yard, for the use of its terminal facilities. This public stock yard is a common carrier, subject in some respects to the jurisdiction of the Interstate Commerce Commission, and in others to that of the Secretary of Agriculture. Its unloading charges, fixed according to a tariff published and on file with the Interstate Commerce Commission, are collected by the

[5] Section 9 provides for concurrent jurisdiction of the Interstate Commerce Commission and the courts "for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter. . . ." Section 22 provides that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; . . ."

[6] Cf. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426; Mitchell Coal & Coke Co. v. Pennsylvania R. R., 230 U. S. 247.

railroads from petitioner and other shippers and are in turn paid to the Stock Yards Company.[7] This charge, however, does not include payment for use of the facilities after unloading and before delivery to consignees, or for any services then performed. To cover these items, the Stock Yards Company collects an additional charge, since 1921 contained in a tariff filed with the Secretary of Agriculture,[8] and it is this charge which is at the root of the present controversy.

In 1933 petitioner, without resort to the Interstate Commerce Commission, demanded that the railroads alter this long-standing practice so as to relieve it from payment of this additional charge. Pursuant to its purpose, petitioner notified the railroads that it would not thereafter utilize any services after unloading; asked that tender of delivery be made to it immediately after unloading so that it could remove its stock to its own plant; avowed its readiness thereafter to accept delivery at such "reasonable and proper delivery pens of the carrier" at "Union Stock Yards, Illinois," as might be provided by the railroads; demanded that the railroads either directly or through their agent, the Stock Yards Company, deliver the consigned stock to petitioner without any charges except those paid for transportation; and declared that delivery to the Stock Yards Company contrary to petitioner's demand would be treated as a conversion of property for which the railroads would be held responsible. Notwithstanding this demand the railroads continued to deliver petitioner's consignments to the Stock Yards Company and that Company, over petitioner's protest, continued to exact the controverted charge. The railroad companies knew that delivery to petitioner would only be made by the Stock Yards Company on Company property and with no means of egress save by crossing other property of the Company, for which privilege a charge would be exacted.

The complaint adds that in spite of this demand the railroads have "continuously refused to provide or establish by lease or otherwise at their said common station, Union Stock Yards, Illinois, any depot or platforms, pens or facilities" where petitioner might

[7] Special statutory provision requires railroads delivering at public stockyards to unload the livestock. "Transportation . . . of ordinary livestock . . . destined to or received at public stockyards shall include . . . delivery . . . into suitable pens. . . ." 49 U. S. C. § 15(5).

[8] Packers & Stockyards Act, 42 Stat. 159, 7 U. S. C. § 181 *et seq.* Before 1921, this charge was fixed by the Stock Yards Company itself.

accept delivery of its stock without payment of the controverted charge, and have also "failed to make any arrangement with its said agent under . . . which the plaintiff might have free ingress . . . and egress . . . to a public street." Specifically, two breaches are alleged: (1) a breach of duty in failing "to provide reasonably convenient, accessible and safe unloading pens, at the said common depot or station, at which such livestock could be tendered to plaintiff"; and (2) a breach of contract in "failing to afford to plaintiff an opportunity of receiving its livestock and of removing the same with reasonable promptness from the unloading pens used by defendants at Union Stock Yards, Chicago, Illinois, or from any point at which delivery thereof is tendered . . . ." The contract relied on provides "That the carrier has received from the shipper . . . the livestock . . . consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, ..." The usual place of delivery for livestock shipped to Union Stock Yards, Chicago, Illinois, and indeed the only place of delivery ever utilized at that station so far as the complaint shows is the public stock yards.

The complaint concludes with a prayer for affirmative relief: an adjudication that petitioner is entitled to delivery free of any charges other than those filed with the Interstate Commerce Commission; a mandatory injunction to require such delivery; and an accounting for those charges paid under protest.

This statement of the facts alleged in the complaint reveals that there are many questions relating to complex transportation problems that must be solved as a prerequisite to a determination of whether the railroads, in violation of contracts or governing laws, have failed properly to deliver petitioner's livestock.[9] For illustration:

First. At what point did the common carriers' duty to transport come to an end? Neither the statute nor any applicable principle of governing law can be said to mark this boundary, under all circumstances and conditions and in all cases.

[9] Cf. Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426; Mitchell Coal & Coke Co. *v.* Pennsylvania R. R., 230 U. S. 247; United States *v.* American Sheet & Tin Plate Co., 301 U. S. 402. Petitioner relies on Covington Stock Yards Co. *v.* Keith, 139 U. S. 128. But that case, a suit originally instituted before Congress adopted the Interstate Commerce Act, is not determinative of the respective jurisdictions of the courts and the Commission in this case.

Second. Under the allegations of the complaint, the practice of delivering livestock to the public stock yards in Chicago, and the practice of the Stock Yards Company of exacting a charge from consignees, are long-standing customs. Shippers, railroads, the Stock Yard Company, and the Interstate Commerce Commission alike have left these practices in effect over a long period of years. If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission. And before such long-standing transportation customs can be held illegal, it is of course necessary that evidence be heard.

Third. If the railroad delivers through the public stock yards, and petitioner's position is sustained, the railroad must necessarily absorb the additional charge. Under the complaint, this would be upon the basis that the railroad had not fully performed its transportation service. Yet the tariff charges for shipping petitioner's livestock were based upon the long-standing custom in which petitioner and the other packers had acquiesced. The railroad is entitled to receive and the shipper is required under the statute to pay a just and reasonable rate. A court judgment in favor of petitioner would reduce the compensation of the railroads for the performance of their services, and would in effect constitute a readjustment of their rate schedules.

Fourth. If, as petitioner insists, it is the duty of the railroads to provide terminal facilities which they do not now own, possess or control, a drastic change might have to be accomplished by them. Property might have to be acquired, expensive facilities might have to be secured, and correspondingly, rates might have to be adjusted. The need for such steps raises a transportation problem of the greatest magnitude, involving many intricate considerations such as must always play a part in evaluating a claim that new depots and facilities are necessary.

Fifth. The complaint shows that there is no provision in the tariff which would authorize the railroads to make refunds to petitioner of those charges paid by petitioner to the Stock Yards Company. Such refunds, if made, would be in the nature of special

allowances not authorized by the tariff. A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make.

Sixth. The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission.

The complexities of the situation here presented are graphically illustrated in the companion case of *Swift & Co.* v. *Alton R. R.*, 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits.[10]

The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for their application. The decision below is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] For instances where this Court has referred to the Commission's reports as indicative of the administrative problems involved in particular cases, see Loomis *v.* Lehigh Valley R. R., 240 U. S. 43, 50-51; Northern Pacific Ry. *v.* Solum, 247 U. S. 477, 483.